Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF MURIEL A.M.S. KOLE, AND MURIEL MAHALEK,
Petitioners,
v.
KOREAN AIR LINES CO., LTD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED FOR REVIEW

1. Must a surviving parent or sibling prove that they were financially dependent on a decedent in order to recover damages for loss of society under the Warsaw Convention?

2. May a surviving parent or sibling recover damages for grief under the Warsaw Convention?

3. Must a surviving parent or sibling prove that they were financially dependent on a decedent in order to recover damages for loss of support and loss of inheritance under the Warsaw Convention?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is not yet officially reported. It is reproduced in the Appendix to this Petition. Opinions from the United States District Court for the Southern District of New York are reported at 814 F.Supp. 605 (S.D.N.Y. 1993), 807 F.Supp. 1073 (S.D.N.Y. 1992), and 146 F.R.D. 61 (S.D.N.Y. 1992).

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

This case raises the interpretation of Aricle 17 of the Warsaw Convention, known formally as the Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* 49 U.S.C. § 1502 note.

WARSAW CONVENTION ARTICLE 17

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

STATEMENT OF THE CASE

Korean Air Lines Flight 007 strayed into Soviet airspace and was shot down on September 1, 1983. All those aboard perished. Among the passengers was Muriel A.M.S. Kole, whose mother, Muriel Mahalek ("Mahalek"), and sister, Marjorie Zicherman ("Zicherman"), are the Petitioners before this Court.

The Petitioners filed suit against Korean Air Lines Co., Ltd ("KAL") in the Southern District of New York. Each Petitioner sought recovery in her individual capacity, and Zicherman also sued as the personal representative of her sister's estate. Along with all other federal court actions arising out of the KAL tragedy, the Petitioners' case was transferred to the United States District Court for the District of Columbia for consolidated proceedings on the question of liability. *See In re Korean Air Lines Disaster of September 1, 1983*, 575 F.Supp. 342 (J.P.M.D.L. 1983).

Following a jury trial, KAL was found liable for "wilful misconduct" in connection with the Flight 007 tragedy. Under Article 25 of the Warsaw Convention, KAL therefore could not invoke the $75,000.00 cap on damages that would otherwise be available. The Petitioners' case was then remanded to the District Court for a damages trial.[1]

Before a jury was empaneled to assess damages against KAL, the District Court made rulings on the elements of damages recoverable under the Warsaw Convention. The District Court ruled, *inter alia*, that the Petitioners could recover for loss of the decedent's society, and for mental injury they suffered in the aftermath of the tragedy.[2] *See* 807 F.Supp. at 1077-78, 1084-88. The District Court did not require that the Petitioners prove they were financially dependent on the decedent in order to recover damages for loss of society.

After hearing evidence, the jury awarded damages to the Petitioners as follows:

Mahalek		
1.	Mental injury	$ 96,000
2.	Loss of society	$ 28,000

[1] In the interests of brevity, some of the steps along the way of the complex multidistrict proceedings have been omitted.

[2] "Mental Injury" is used interchangeably with "grief" in the opinions below.

Zicherman		
1.	Mental injury	$ 65,000
2.	Loss of society	$ 70,000
3.	Loss of support	$ 5,000
4.	Loss of inheritance	$ 11,000
Zicherman (as executrix)		
1.	Decedent's conscious pain and suffering	$100,000

The District Court computed prejudgment interest, and entered final judgment.

KAL noticed an appeal from the District Court's final judgment, contesting all of the damages awarded on both legal and factual grounds. In an opinion dated November 3, 1994, the Second Circuit affirmed the District Court's judgment, with two important exceptions:

1. The Second Circuit ruled that damages for loss of society cannot be recovered under the Warsaw Convention unless the surviving relative was financially dependent on the decedent;

2. The Second Circuit also ruled that damages for mental injury are not recoverable under the Warsaw Convention under any circumstances.

Because the jury had not been instructed that financial dependency was a prerequisite to recovery for loss of society, the Second Circuit examined the record for evidence on the question. It found that Mahalek was, without question, not financially dependent on her daughter, and accordingly vacated all of the damages that Mahalek had been awarded. As to Zicherman, the Second Circuit found some evidence of financial dependency, and therefore remanded the case back to the Dis-

trict Court for a determination on this narrow question.[3] The mental injury award to Zicherman was vacated.

After the Second Circuit issued its November 3 opinion, KAL petitioned for a rehearing. On December 5, 1994, the Second Circuit withdrew its initial opinion, and filed an amended opinion. In the amended opinion, the Second Circuit ruled that the jury's awards for loss of support and loss of inheritance were also subject to a financial dependency requirement. These two awards were therefore vacated, pending further proceedings in the District Court.

Zicherman and Mahalek now petition this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

There are three compelling grounds for this Court to grant certiorari and review the decision below.

1. A conflict exists among circuit courts as to whether federal damage law requires a showing of financial dependency in order to recover loss of society damages. By imposing a financial dependency requirement, the Second Circuit adopted a cruel and irrational rule of law, one that is particularly inappropriate under the unique structure of the Warsaw Convention.

2. A conflict exists among circuit courts concerning recovery for mental injury under federal law. The Second Circuit's ruling unduly restricts recovery under the Convention, and affords an unconscionable degree of economic protection to

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[3] This very narrow remand should not interfere with this Court's review of the Petitioner's case. Indeed, if this Court were to reverse the Second Circuit's ruling on financial dependency, further proceedings in the District Court would probably be unnecessary. *See generally Frisby* v. *Schultz*, 487 U.S. 474, 479 (1988) (Supreme Court will review Court of Appeals judgment even if further proceedings in District Court are contemplated, where those further proceedings would not aid Supreme Court's review of case).

the airline industry where a carrier has been found liable for egregious, willful misconduct.

3. Numerous cases arising from the KAL tragedy and the disaster at Lockerbie, Scotland are pending in Courts of Appeal and District Courts around the country. This Court should provide definitive guidance on the elements of damages recoverable under the Warsaw Convention to prevent conflicting and inconsistent results.

ARGUMENT

I. Certiorari Should Be Granted to Resolve Conflicting Opinions on Recovery for Loss of Society Damages.

The Second Circuit drew exclusively on general federal maritime law to decide what damages are recoverable under the Warsaw Convention. It then followed those Circuit Courts of Appeal that impose a financial dependency requirement for loss of society damages under general maritime law. *See, e.g., Anderson* v. *Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990); *Sistrunk* v. *Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985). The Second Circuit recognized, however, that the Ninth Circuit has reached the opposite result; the Ninth Circuit has ruled that there is no need to establish financial dependency. *Sutton* v. *Earles*, 26 F.3d 903, 914-17 (9th Cir. 1994).

Although the Second Circuit's position is followed by other circuits, the rule espoused by the Ninth Circuit is more sensible, more modern, and should be adopted. Financial dependency has no rational relationship of any kind to loss of companionship, and it is crass and inhumane to suggest otherwise. In the case below, Mahalek worked hard her whole life, supported herself, and did not look to her children for support; as a result, she recovered nothing for the loss of her daughter. Had she

been lazy, or a freeloader, and insisted on support from the decedent, she would have recovered. This is an absurd result, and it must not stand.

This Court has recognized that, at least for federal general maritime wrongful death actions, loss of society is recoverable. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974). Although the issue of financial dependency was not raised under the facts of *Gaudet*, imposing a dependency requirement is inconsistent with this Court's definition of "society" as embracing a broad range of mutual benefits *each family member* receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. 414 U.S. at 585 (emphasis added).

It must also be remembered that the case below was not a maritime case *per se*, but rather a Warsaw Convention case. Although the Second Circuit properly drew on maritime law for some guidance in construing the Convention, it failed to take note of one special feature not found in maritime law: the damage cap. In the vast majority of international aviation accidents, Article 25 of the Warsaw Convention limits the air carrier's liability to $75,000.00 per passenger. This is a tremendous economic advantage for the aviation industry, one that the shipping industry does not have. As a result, in the rare case of willful misconduct, it is unfair to further limit liability by imposing a financial dependency requirement on loss of society damages.[4]

II. Certiorari Should Be Granted to Resolve the Question of Recovery for Mental Injury Under the Warsaw Convention.

There are two divergent lines of authority that address recovery for grief or mental injury under federal law. First: cases

[4] For these reasons, awards for loss of support and loss of inheritance should also be unfettered by a financial dependency requirement.

decided under civil rights statutes tend to permit recovery for mental injury. *See, e.g., Bell* v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Berry* v. *City of Muskogee, Oklahoma*, 900 F.2d 1489 (10th Cir. 1990); *Henry* v. *Gross*, 803 F.2d 757, 768 (2d Cir. 1986). Second: general maritime cases deny recovery for mental injury. *See, e.g., Mobil Oil Corp.* v. *Higgenbotham*, 436 U.S. 618, 622 (1978).

Under Article 17 of the Warsaw Convention, a decision must be made as to which line of authority to follow concerning mental injury damages. The Second Circuit elected to follow maritime law. As discussed above, this decision is inappropriate, because the Warsaw Convention has a $75,000.00 damage cap in most cases, while maritime law does not. The aviation industry is thus afforded an unconscionable double layer of protection from tortious misconduct.

Apart from the damages cap, the Second Circuit's opinion also overlooked the history behind the Warsaw Convention. The drafters of the Convention understood that "damage sustained" in Article 17 included the mental injury of surviving relatives. *See In re Air Disaster of Lockerbie, Scotland*, 928 F.2d 1267, 1282 (2d Cir. 1993), *citing* Lowenfeld, *Aviation Law*, § 1.52 at 7-19 (2d ed. 1981) (relying on French legal meaning of "dommage," or damage). Specifically:

> There is nothing in French law prohibiting compensation for any particular kind of damage, be it mental injury, suffering due to the death of a member of a family, or pain and suffering due to a physical injury.

In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475, 1487 (D.C. Cir. 1991), *quoting* Miller, *Liability in International Air Transport*, 112 (1977). *See also Diaz-Lugo* v. *American Airlines, Inc.*, 686 F.Supp. 373, 376 (D.P.R. 1988) (under Article 17, both loss of consortium and emotional

distress suffered by non-passenger when passenger was injured constitute "damage sustained").

This Court has never directly addressed recovery for a relative's mental injury under the Warsaw Convention. However, in *Eastern Airlines, Inc.* v. *Floyd*, 111 S.Ct. 1489 (1991), this Court analyzed the French term "lésion corporelle" (bodily injury) as it appears in Article 17:

> The carrier shall be liable for damage sustained ["dommage survennu"] in the event of the death or wounding of a passenger or any other bodily injury ["lésion corporelle"] suffered by a passenger . . .

49 Stat. 3018. The passengers involved in the *Floyd* case had experienced fright while on board an aircraft, but had not been physically injured; this Court decided that there had been no "lésion corporelle," and denied recovery.

The decision in *Floyd* is not directly applicable to the case below, because Muriel Kole died in the crash of Flight 007; there was therefore no need to consider whether a "lésion corporelle" occurred on board the plane. Here, the only question is whether or not her survivors' mental injury constitutes "dommage survenu," or damage sustained, a question that this Court alluded to, but explicitly declined to address in *Floyd*. 111 S.Ct. at 1496, n.7. Nonetheless, by citing French law sources that did permit recovery for the grief and mental injury of a surviving relative, this Court implied that such a recovery should also be permitted by federal courts construing the Warsaw Convention. *See also Air France* v. *Saks*, 470 U.S. 392, 399 (1985) (French legal history and doctrine is of considerable importance when construing the Warsaw Convention).

III. Cases Pending Across the Country Await a Definite Ruling on Damages Recoverable Under the Warsaw Convention.

There are currently at least 31 pending cases arising out of the KAL tragedy that have not yet had a jury trial to assess damages. In addition, KAL has appeals of damage verdicts which are pending in the Second, Sixth and Ninth Circuit Courts of Appeal, as well as the District of Columbia Circuit Court of Appeals. Given the uncertainty over the elements of damages recoverable under the Warsaw Convention, the risk of inconsistent treatment of similarly situated plaintiffs is great.

It should also be noted that the bombing of Pan American flight 103 over Lockerbie, Scotland, led to a finding of willful misconduct by the defendant airline. *See Pagnucco et al.* v. *Pan American World Airways, Inc.*, ___ F.3d ___ (Nos. 1280, 1281, 1282, 2d. Cir., 1994). There are approximately 210 damages cases waiting to be tried in the aftermath of the *Lockerbie* decision. These cases also await definitive guidance from this Court on the damages available under the Convention. The case below offers this Court its first opportunity to reach this issue.

CONCLUSION

Certiorari should be granted to review the decision below.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 542, 667 August Term, 1993

Petition for Rehearing Submitted: November 17, 1994

Docket Nos. 93-7490; 93-7546

MARJORIE ZICHERMAN, individually and as executrix under the estate of Muriel A.M.S. Kole; MURIEL MAHALEK, mother and next of kin of Muriel A.M.S. Kole,

Plaintiffs-Appellees/Cross-Appellants,

MICHAEL KOLE,
Plaintiff,

– against –

KOREAN AIR LINES CO., LTD,
Defendant-Appellant/Cross-Appellee.

Before: LUMBARD, VAN GRAAFEILAND, and WINTER, Circuit Judges.

Petition for rehearing of decision rendered November 3, 1994. Upon consideration of the petition, the opinion filed November 3, 1994, is withdrawn, and an amended opinion is filed. The petition for rehearing is denied.

Defendants appeal from a judgment entered in the District Court for the Southern District of New York (Motley, J.) on April 12, 1993, following a jury verdict in a wrongful death action. Plaintiffs cross-appeal the trial court's calculation of prejudgment interest.

Affirmed in part, vacated in part, and remanded in part.

W. PAUL NEEDHAM, Boston, Massachusetts (Needham & Warren, Boston, Massachusetts, Kevin M. Hensley; Christopher Lovell, New York, New York, of counsel), for Plaintiffs-Appellees/Cross-Appellants.

ANDREW J. HARAKAS, New York, New York (Condon & Forsyth, New York. New York, George N. Tompkins, Jr., Jeanine C. Veracoechea, George N. Tompkins, III, Peter F. Tamigi, of counsel), for Defendant-Appellant/Cross-Appellee.

LUMBARD, Circuit Judge:

These appeals were argued on October 28, 1993. We delayed our determination pending a decision in *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, slip op. 7795 (2d Cir. Sept. 12, 1994) ("*Lockerbie II*"), which already had been heard by a different panel on May 19, 1993.

Korean Air Lines Co., Ltd ("KAL") appeals from a judgment of the Southern District of New York (Motley, J.) entered on April 12, 1993, following a jury verdict which awarded damages of $251,000 to Marjorie Zicherman and $124,000 to Muriel Mahalek, the surviving sister and mother, respectively, of KAL passenger Muriel Kole. After trial, the district court granted prejudgment interest on the judgment, but discounted the jury award at a rate of 2% per annum to the date of the accident in calculating prejudgment interest. *Zicherman* v. *Korean Air Lines Co., Ltd*, 814 F.Supp. 605, 612 (S.D.N.Y. 1993).

KAL argues that: (1) federal maritime law precludes plaintiffs' recovery for loss of society; (2) federal maritime law precludes plaintiffs' recovery for mental injury or grief; (3) the evidence was insufficient to sustain an award to Zicherman as executrix of the estate for Kole's conscious pain and suffering; and (4) the evidence was insufficient to sustain an award to Zicherman for loss of support and loss of inheritance. Plaintiffs cross-appeal the court's discounting of prejudgment interest.

The award for pain and suffering and the district court's calculation of prejudgment interest are affirmed. The awards for mental injury and Mahalek's loss of society are vacated. The awards to Zicherman for loss of society, loss of support, and loss of inheritance are reversed and remanded.

I.

On September 1, 1983, KAL flight KE007, en route from New York to Seoul, South Korea, strayed into Soviet airspace over the Sea of Japan and was shot down. All 269 persons on board died, including Muriel Kole. Zicherman and Mahalek, surviving relatives of Kole, brought suit in the Southern District of New York to recover damages.

The Judicial Panel on Multidistrict Litigation transferred all federal court actions arising out of the disaster to the District of Columbia for trial on the common issue of liability. *In re Korean Air Lines Disaster of September 1, 1983*, 575 F.Supp. 342 (J.P.M.D.L. 1983). After a jury determined that the crash was proximately caused by KAL's "willful misconduct," *see In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert denied*, 112 S.Ct. 616 (1991), the Multidistrict Panel remanded the individual cases to their courts of origin to determine damages.

Prior to trial of Zicherman and Mahalek's damages, KAL moved for a determination that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-68 (1988), limited dependent survivors' recovery to pecuniary losses. Judge Motley denied the motion, holding that plaintiffs as close surviving relatives could recover for loss of love and affection ("loss of society") and for mental injury and grief, and that Zicherman as executrix of Kole's estate could recover for Kole's pre-impact conscious pain and suffering. *In re Korean Air Lines Disaster of September 1, 1983*, 807 F.Supp. 1073, 1080-88 (S.D.N.Y. 1992).

At trial, two expert witnesses testified as to Kole's conscious pain and suffering. James Foody, an aeronautical engineer, testified that the Soviet aircraft fired two missiles, which struck the KAL plane at an altitude of 35,000 feet; that the missiles probably caused a five-foot hole in the rear fuselage; and that the plane remained airborne for twelve minutes there-

after. Robert Elzy, an aviation physiologist, testified that such a hole would cause rapid decompression of the plane; that passengers would experience intense pain in their ears, sinuses, lungs, stomach, and intestines due to decompression; and that passengers had sufficient time to don oxygen masks which would allow them to remain conscious during the plane's descent.

Zicherman testified that she had received financial assistance from Kole. Kole had paid Zicherman's wedding expenses and had volunteered to finance Zicherman's purchase of a new home. Prior to Kole's flight, Zicherman — who was then pregnant — received an envelope to be opened in the event of Kole's death; the envelope contained a letter describing Kole's assets and stating, "[t]ake everything and spend it on yourself and the baby, if anything happens to me." In contrast, Mahalek stated on cross-examination that she was never financially dependent on Kole.

The jury returned a total verdict of $375,000 as follows:

Mahalek		
1.	Mental injury	$ 96,000
2.	Loss of society	$ 28,000
Zicherman (personal capacity)		
3.	Mental injury	$ 65,000
4.	Loss of society	$ 70,000
5.	Loss of support	$ 5,000
6.	Loss of inheritance	$ 11,000
Zicherman (as executrix of Kole's estate)		
7.	Kole's pain and suffering	$100,000

The district court ruled that plaintiffs were entitled to prejudgment interest. The court discounted the judgment back to the date of the accident at a rate of 2% per annum and awarded prejudgment interest on that amount.

II.

Where injuries occur on an international flight, the Warsaw Convention provides an exclusive cause of action. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. § 1502 note (1988); *In re Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267, 1274-80 (2d Cir.) ("*Lockerbie I*"), *cert. denied*, 112 S.Ct. 331 (1991). However, because the Warsaw Convention is silent on the question of damages, we look to federal law to decide such issues. *Lockerbie I*, 928 F.2d at 1278-79.

KAL argues that because flight KE007 was shot down over non-territorial waters, the applicable law is DOHSA, which expressly limits recovery to pecuniary loss. 46 U.S.C. § 762; *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 622-26 (1978). We disagree.

In *Lockerbie I*, we adopted the federal common law to govern causes of action under the Warsaw Convention. 928 F.2d at 1278. In *Lockerbie II*, we held that damages under the Warsaw Convention should be determined "by an examination of maritime law, which is probably the oldest body of federal common law." Slip op. at 7841. While two maritime statutes — DOHSA and the Jones Act, 46 U.S.C. app. § 688 (1988) — preclude recovery for non-pecuniary loss, general maritime cases not brought under such statutory restrictions allow recovery. *Id.*, slip op. at 7841-42; *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 585-88 (1974) (recognizing loss of society damages as remedy available under general maritime law). Looking at the language and underlying policies of the Warsaw Convention, we concluded that compensatory, non-pecuniary damages are appropriate under the Convention. *Lockerbie II*, slip op. at 7842-43. Accordingly, we held that

under the general maritime principles of *Gaudet* and its progeny, the Warsaw Convention permits recovery for loss of society. *Id.*, slip op. at 7843.

KAL seeks to distinguish the *Lockerbie* decisions as involving an accident over dry land, whereas the present action involves an accident over water. However, as we have stressed, a uniform law should govern Warsaw Convention cases. *Lockerbie I*, 928 F.2d at 1278-79. Adopting one rule for Convention cases involving accidents over land and another for accidents over water would defeat such uniformity.

Our holding is consistent with the Congressional scheme under DOHSA, which was enacted in 1920 to create a federal cause of action for accidental deaths occurring on the high seas. The Supreme Court has held that DOHSA preempts state causes of action in disputes arising from accidental deaths in non-territorial waters. *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986) (applying DOHSA to offshore helicopter crash). In contrast to *Tallentire*, however, the present causes of action arise not under domestic law but under the Warsaw Convention, an international treaty. Unlike *Tallentire*, therefore, the question before us is not whether to apply federal or state law, but rather which federal law to apply. We cannot reconcile DOHSA's limitation of damages to pecuniary loss with the "aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention," *Lockerbie II*, slip op. at 7842, including non-pecuniary loss. In order to maintain a uniform law under the Warsaw Convention, we find general maritime law, rather than DOHSA, more appropriate. *See, e.g., Domangue* v. *Eastern Air Lines, Inc.*, 722 F.2d 256, 262 (5th Cir. 1984) ("[T]he Warsaw Convention and Montreal Agreement were intended to act as a uniform international law which supplants each member nation's varied laws.")

Under federal maritime law, the rule is well-established that only dependents may recover damages for loss of decedent's

society. *Wahlstrom* v. *Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1092 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1060 (1994); *Anderson* v. *Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990) *Sistrunk* v. *Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *but see Sutton* v. *Earles*, 26 F.3d 903, 914-17 (9th Cir. 1994) (allowing nondependent parents to recover loss of society damages in general maritime action). No doubt this rule denies recovery to some deserving parties; nondependent survivors may feel the loss of a loved one as keenly as dependent survivors. However, the inherent concerns of vagueness and uncertainty "necessitate[] that we draw a line between those who may recover for loss of society and those who may not." *Miles* v. *Melrose*, 882 F.2d 976, 989 (5th Cir. 1989), *aff'd sub nom. Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990). This distinction between dependents and nondependents has been commended "as the most rational, efficient and fair." *Miles*, 882 F.2d at 989.

In *Lockerbie II*, we extended to Warsaw Convention cases the general maritime rule limiting loss of society damages to dependents, *see* slip op. at 7844. Under that rule, Zicherman and Mahalek may recover loss of society damages only if they were dependents of Kole at the time of her death.

The test of dependency is the existence of "a legal or voluntarily created status where the contributions are made for the purpose and have the result of maintaining or helping to maintain the dependent in [her] customary standard of living." *Petition of United States*, 418 F.2d 264, 272 (1st Cir. 1969). Because Judge Motley did not explicitly instruct the jury to condition their awards for loss of society on finding such a status, we scrutinize the record to determine what findings a jury could make on this issue.

KAL contends that, as a matter of law, Mahalek may not recover loss of society damages. The record shows that Mahalek

offered no evidence to support a claim of dependency. Further, Mahalek specifically conceded on cross-examination her lack of dependence. Presented with such evidence, no jury could find Mahalek entitled to recover damages as a dependent. We reverse and vacate the award to Mahalek accordingly.

KAL further argues that the evidence submitted by Zicherman is insufficient to satisfy the test stated above. In contrast to Mahalek, Zicherman testified to generous financial assistance from Kole, including an offer to finance Zicherman's purchase of a house. Yet the record does not establish that Kole in fact financed such a purchase. Presented with such evidence, the jury could find the test of dependency satisfied, but it also could find this test not satisfied. We reverse and remand the award of loss of society damages to Zicherman, pending trial of this issue.

III.

Although federal maritime law permits dependent survivors to recover damages for loss of decedent's society, it precludes survivors from recovering additional damages for their grief or mental injury. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 622 (1978); *Gaudet*, 414 U.S. at 585-86 n.17. Nonetheless, the district court determined that this rule was inapplicable to Warsaw Convention cases. *In re Korean Air Lines Disaster of September 1, 1983*, 807 F.Supp. at 1085-86. The court reasoned that the Warsaw Convention permits recovery for "damages sustained," and that the mental injury or grief of surviving relatives is one such species of damages.

We disagree. As we stated in *Lockerbie II*, federal maritime law supplies the measure of damages for injuries arising out of accidents governed by the Warsaw Convention. As federal maritime law does not permit surviving relatives to recover damages for mental injury or grief in addition to damages for

loss of society, we reverse and vacate the awards to Zicherman and Mahalek for mental injury.

IV.

In order to recover for Kole's pre-death pain and suffering, Zicherman, as executrix, was required to provide evidence from which the jury could infer that Kole: (1) survived the missile explosions; (2) was conscious and aware for a period of time; and (3) experienced pain and suffering. To support the claim, Zicherman introduced the testimony of Foody and Elzy.

KAL contends that Zicherman did not satisfy her evidentiary burden because she offered no direct evidence on any of these points, and that the expert testimony was mere generalized testimony concerning the possible effects of a missile strike on a passenger-filled Boeing 747 flying at 35,000 feet. We disagree. Eyewitness testimony as to decedent's pain and suffering is not essential to recovery in fatal aircraft accidents, because such evidence "is difficult if not impossible to obtain." *Shatkin* v. *McDonnell Douglas Corp.*, 727 F.2d 202, 206 (2d Cir. 1984). Obviously, it was impossible to produce such evidence in this case. Plaintiffs satisfied their burden by providing circumstantial evidence from which "it can reasonably be inferred that the passenger underwent some suffering before the impact." *Id.* A jury which accepted Foody and Elzy's testimony could reasonably infer that Kole remained conscious for a period of up to twelve minutes after the missile strike, during which time she experienced intense, decompression-induced pain. We affirm the award to Zicherman, as executrix of Kole's estate, for Kole's pre-death conscious pain and suffering.

V.

Damages for loss of support and loss of inheritance are well-recognized wrongful death remedies under maritime law. *See Gaudet*, 414 U.S. at 584 & n.11; *Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983). However, courts generally have conditioned such awards on a showing of full or partial dependency. *See, e.g., Wahlstrom*, 4 F.3d at 1093 ("Loss of support or services is compensable, but only to the extent that the [non-dependent parents] anticipated future pecuniary benefits from support or services to be rendered to them by their deceased son."); *Evich* v. *Connelly*, 759 F.2d 1432, 1433-34 (9th Cir. 1985) (denying recovery for pecuniary loss to non-dependent siblings); *In re DFDS Seaways (Bahamas) Ltd.*, 684 F.Supp. 1160, 1165 (S.D.N.Y. 1988) (parent who alleges partial dependency on decedent states claim for loss of support or services). Accordingly, we reverse and remand the awards to Zicherman for loss of support and loss of inheritance for determination of the issue of dependency.

VI.

In *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983), the Supreme Court recognized that courts may discount damages to their present value to reflect the impact of inflation on future wages and prices. Traditionally, courts have used this technique in connection with awards to reflect foregone future wages or other future loss. *See, e.g., Chiarello* v. *Domenico Bus Service, Inc.*, 542 F.2d 883, 886 & n.4 (2d Cir. 1976). The district court discounted the entire award to the date of the accident, including that portion reflecting plaintiffs' loss between the date of the accident and the jury verdict, as a precursor to awarding prejudgment interest. We are not persuaded by the plaintiffs that the court should have discounted

only that portion of the award reflecting future loss from the date of the verdict.

The calculation of the prejudgment interest is a discretionary matter for the district court. *United States* v. *Seaboard Surety Co.*, 817 F.2d 956, 966 (2d Cir.), *cert. denied*, 484 U.S. 835 (19876). A jury verdict rendered in 1992 for an accident that occurred in 1983 may well reflect the inflationary impact of the intervening nine years; the court did not abuse its discretion. We affirm the district court's calculation of prejudgment interest.

The award to Zicherman as executrix of Kole's estate for Kole's pre-death pain and suffering and the court's calculation of prejudgment interest are affirmed. The awards to Zicherman and Mahalek for mental injury and the award to Mahalek for loss of society are reversed and vacated. The awards to Zicherman for loss of society, loss of support, and loss of inheritance are reversed and remanded for proceedings consistent with this opinion.

APPENDIX B.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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83 Civ. 8428 (CBM)

In re Korean Air Lines
Disaster of September 1, 1983

Amended Opinion
On Pre-Trial
Motions

November 20, 1992

This case arises out of the tragic downing of Korean Air Lines Flight KE007. On September 1, 1983, while the plane was enroute from New York to Seoul, South Korea, the plane strayed into Soviet airspace and was show down by Soviet military aircraft over the Sea of Japan. All 269 persons aboard were killed. Muriel A.M.S. Kole was among those who perished. Muriel Mahalek, her mother, and Marjorie Zicherman, her sister and executrix of her estate, are among the many surviving relatives who filed suit to recover damages under the Warsaw Convention which applies specifically to such airline disasters and to which the United States is a party.[1]

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted at* 49 U.S.C.App. § 1502. The Warsaw Convention was supplemented by the Montreal Agreement, Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, CAB Agreement 18900, note following 49 U.S.C.App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302). Typically, airplane crash damages recovery under the Warsaw Convention is restricted by the $75,000 cap of the Montreal Agreement. However, where there is a finding of "wilful misconduct," as in this case, the cap does not apply.

BACKGROUND

All federal court actions in the United States arising out of this disaster were transferred in 1983 to the United States District Court for the District of Columbia (Chief Judge Aubrey E. Robinson, Jr.) for coordinated and consolidated proceedings on the common liability issues.

The common liability issues — whether the destruction of Flight KE007 by Soviet military aircraft was proximately caused by the "wilful misconduct" of KAL or its employees within the meaning of Article 25 of the Warsaw Convention and whether punitive damages are recoverable — were tried to a jury in the District of Columbia. The jury returned a verdict finding that the downing of Flight KE007 and the deaths of all on board were proximately caused by the "wilful misconduct" of the flight crew of Flight KE007 and assessed punitive damages against KAL. Individual compensatory damages were to be separatedly determined. The Court of Appeals for the District of Columbia Circuit upheld the jury finding of "wilful misconduct." However, it vacated the punitive damages award, holding that the Warsaw Convention does not permit the recovery of punitive damages. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct. 616, 116 L.E.2d 638 (1991) ("*In re Korean Air Lines*"). *Accord In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 331 (1991) ("*Lockerbie*"). Plaintiffs and KAL each filed a petition for a writ of certiorari. Both petitions were denied by the United States Supreme Court on December 2, 1991. *Dooley* v. *Korean Air Lines Co., Ltd*, ___ U.S. ___, 112 S.Ct. 616, 116 L.Ed.2d 272 (1991). The common liability issues having been determined (*i.e.*, the existence of Article 25 "wilful misconduct" which lifts the otherwise applicable $75,000 cap on damages in airline crashes and the

non-recoverability of punitive damages), these cases were remanded by the Judicial Panel on Multidistrict Litigation to the original transferor courts for trial of issues relating to compensatory damages and by whom recoverable.

Plaintiffs' and Defendant's Claims Regarding Damages

The instant case is now before this court for trial on the issue of compensatory damages sought by decedent's mother and sister in their individual capacities and by the sister as the executrix of decedent's estate for the benefit of the estate and its beneficiaries. Plaintiffs' amended complaint in this action seeks recovery of damages under the Warsaw Convention or the Death On the High Seas Act ("DOHSA").[2] Plaintiffs seek to recover for both pecuniary and non-pecuniary losses under the Warsaw Convention or, in the alternative, pecuniary losses under DOHSA.

Plaintiffs' contend that the Warsaw Convention creates a cause of action for injuries sustained in favor of any person who has suffered any loss whether pecuniary or non-pecuniary as a result of an airplane accident or disaster. Decedent's mother seeks damages for mental anguish and grief associated with her daughter's death as well as loss of love, affection, and companionship. Decedent's sister also seeks damages for such losses in her individual capacity. As executrix of her deceased sister's estate, the sister seeks to recover for decedent's conscious pain and suffering before her death on the plane and loss of the quality or enjoyment of life as well as loss of support, loss of services, and loss of inheritance for herself and decedent's mother.

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[2] Death On the High Seas Act, 46 U.S.C. § 761 *et seq*. Plaintiffs claim that they amended their complaint to include DOHSA as alternative pleading in the event that the measure of damages was held to be limited by DOHSA under the Warsaw Convention as alleged by defendant.

Defendant's basic claim is that plaintiffs are limited to an action brought by decedent's estate for decedent's wrongful death caused by the plane disaster, a cause of action provided for by the DOHSA, and the recovery of pecuniary losses only as provided by DOHSA. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). Defendant has made several pre-trial motions alleging the procedural and substantive impact of DOHSA. DOHSA, enacted by the Congress in 1920 to provide specifically for a remedy in admiralty for the dependent survivors of seamen for wrongful death on the high seas, applies only when death occurs on the high seas more than a marine league (3 miles) from the shore of any state, the District of Columbia, or any territory of the United States and has been construed by the Supreme Court to limit dependent survivors' losses to pecuniary losses. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 622-23, *reh'g denied*, 439 U.S. 884 (1978); *Miles*, 112 L.Ed.2d at 290.

Parties Pre-Trial Motions

Accordingly, defendant moves to: 1) strike plaintiffs' jury demand; 2) limit the determination of damages to those available under DOHSA; 3) dismiss decedent's mother, Muriel Mahalek, as a party plaintiff; 4) preclude the testimony of plaintiffs' economist with respect to lost future wages of decedent; 5) dismiss claims for decedent's pre-death pain and suffering; 6) preclude the testimony of experts relevant to this issue; 7) preclude recovery for plaintiffs' grief, mental distress, and loss of decedent's love and companionship; and 8) exclude any reference to and evidence of "wilful misconduct" on the part of KAL as found by the jury in the joint liability trial.

Plaintiffs seek additional recovery for decedent's loss of the quality and enjoyment of life and have moved to exclude the testimony of decedent's husband, Michael Kole.

Summary Of This Court's Holdings On The Parties Motions

This court holds that plaintiffs are entitled to a jury trial; that the determination of damages and by whom recoverable under the Warsaw Convention are not limited by DOHSA; that survival actions are permitted under the Warsaw Convention; that the estate may recover for decedent's conscious pain and suffering prior to her death; that the estate cannot recover for decedent's loss of the quality or enjoyment of life; that estate may recover for loss of support, lost services and loss of inheritance for any dependent survivors or beneficiary of the estate; that the individual non-dependent plaintiffs suing in their individual capacities may recover for mental injury connected to physical injury, loss of love and affection, lost inherintance, and lost services. Muriel Mahalek may, therefore, proceed as a party plaintiff. The testimony of Michael Kole, decedent's husband, a non-party, will be excluded as too prejudicial. References to the prior jury's finding of "wilful misconduct" where relevant will not be excluded, and the inability to impose punitive damages will be part of the court's instructions to the jury.

Law Applicable To Warsaw Convention Cases

The Warsaw Convention is a treaty signed by many nations, including the United States. It was ratified by the Senate as required by the Constitution. U.S. CONST. art II, § 2. It is thus the Supreme law of the land. *See Lockerbie*, 928 F.2d at 1278. The Second Circuit in *Lockerbie* held that the Warsaw Convention is a federally-created cause of action, preempting all state causes of action, and must be construed exclusively under federal common law. *See also In re Inflight Explosion on Trans World Airlines, Inc. Aircraft Approaching Athens,*

Greece on April 2, 1986, 778 F.Supp. 625, 629 (E.D.N.Y. 1991), *rev'd on other grounds*, 1992 WL 212001 (2d Cir. 1992) ("*Inflight Explosion*"). The Warsaw Convention, after providing for suit for "damages sustained" (Warsaw Conv., art. 17) by passengers or their "survivors" (*In re Korean Air Lines*, 932 F.2d at 1485-86), provides that questions as to who are the persons who have the right to bring suit and what are their respective rights, measure of damages, as well as procedural questions, shall be determined by the national law of the court where suit is brought, Warsaw Convf., art. 24(2). *Lockerbie*, 928 F.2d at 1283. Therefore, the determination of the issues brought on by defendant's motions are governed by federal law and since the Warsaw Convention, the source of plaintiffs' causes of action, is a federal statute, in construing that statute, federal courts must look to, apply, and develop federal common law. *Lockerbie*, 928 F.2d at 1278-79.

RIGHT TO A JURY

Defendant claims that there is a federal statute, DOHSA, which provides the exclusive remedy in this case under the Warsaw Convention. Defendant also argues that DOHSA is an action which can only be heard by this court sitting in admiralty without a jury, since juries are not available in admiralty. *Waring* v. *Clarke*, 46 U.S. 441, 464 (1847) ("civil causes of admiralty and maritime jurisdiction shall not be tried by a jury"); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 371 n.28 (1959), *reh. den.*, 359 U.S. 962, 79 S.Ct. 795, 3 L.Ed.2d 769 (1959) (no jury right in admiralty). Defendant thus moves to strike plaintiffs' jury demand. Defendant's motion to strike plaintiffs' jury demand is denied.

Sincef it has been determined, by the Second Circuit, that the applicable law is the Warsaw Convention, a federal statute,

which must be construed in the light of federal law, we must first look to the statute. The Warsaw Convention neither provides for nor bars jury trials in cases arising under it. Since Congress has not provided that Warsaw Convention claims be tried by jury and has not barred juries in such cases, we must look to federal common law and other federal statutes for guidance. DOHSA is only one such federal statute. Both the Federal Employers Liability Act ("FELA")[3] and the Jones Act[4] contemplate jury trials in negligence, survival, and wrongful death cases for railroad employees and seamen, respectively. In Civil Rights Cases and *Bivens*-type cases,[5] juries are allowed where damages are sought for violations of constitutional and civil rights.[6] Congressional policy and federal common law thus seem to favor jury trials in personal injury and wrongful

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[3] Federal Employees Liability Act, 45 U.S.C.S. §§ 51 *et seq.* (1992).

[4] 46 U.S.C. App. § 688(a) (Supp. 1991). The Jones Act provides a cause of action against shipowners for their negligence when a seaman is injured on board:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . .; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law. . . .

Id.

[5] In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the Supreme Court held that a cause of action existed to recover money damages for violations of constitutional rights by federal officials.

[6] *Carlson* v. *Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (*Bivens* remedy, allowing jury, available even though suit could have been brought under Federal Tort Claims Act ("FTCA"), which does not permit jury trial). *See also Anderson* v. *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (suit for damages against FBI agents for violation of Fourth Amendment rights decided by jury); *Jett* v. *Dallas Independent School District*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (school teacher's damage claims against superintendent and principal under 42 U.S.C. § 1981 and § 1983 decided by jury); *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 229, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) (school teacher's claims for compensatory and punitive damages under § 1983 decided by jury).

death cases, and Congress has not proscribed jury trials under the Jones Act, which provides for a seaman's action at law, notwithstanding the fact that he might have brought an action in admiralty to recover for his injuries. *Miles*, 112 L.Ed.2d at 285-88.

Applying DOHSA strictly to exclude jury trials would impair the national uniformity which the Second Circuit says the Warsaw Convention was intended to create. *Lockerbie*, 928 F.2d at 1270. If DOHSA strictly applied to preclude jury trials, then international airplane accidents occurring on the high seas would not be tried by a jury while international accidents not occurring on the high seas could be tried before a jury. National uniformity requires that all Warsaw Convention cases be tried before juries.

The jury trial issue in Warsaw Convention cases was expressly raised and decided by Chief Judge Robinson in this case in *In re Korean Air Lines Disaster of September 1, 1983*, 704 F.Supp. 1135 (D.D.C. 1988) ("*Korean I*") and *In re Korean Air Lines Disaster of September 1, 1983*, MDL No. 565, Nos. 83-2793 *et al*, F.Supp. ___, 1992 WL 20043 (April 1, 1992) ("*Korean II*") and is, therefore, the law of the case. *See also Yun v. Korean Air Lines*, ___ F.Supp. ___, 1992 WL 184395 (E.D.N.Y. 1992) (jury trial is law of the case and jury trial available under Warsaw Convention even where DOHSA also applies). It was a jury in the District of Columbia that decided that KAL was guilty of "wilful misconduct" and awarded punitive damages. KAL, by not raising the jury trial issue in this Warsaw Convention case on appeal, waived its right to a non-jury trial if it is in fact entitled to trial without a jury. The instant trial sought here on compensatory damages is not a new action. It is the second part of a bifurcated case. The fact that Chief Judge Robinson has certified the jury trial issue to the D.C. Circuit Court of Appeals in the compensatory damages trials now before him in other similar cases is simply irrel-

evant to whether KAL waived its right to a non-jury trial in this case by not raising the question on appeal.

In *Korean I*, as here, plaintiffs alleged their claims at law and did not plead their claims in admiralty according to Fed.R. Civ.P. 9(4). *Korean I*, 704 F.Supp. at 1151. There, as here, KAL relied primarily upon *Higginbotham*, 436 U.S. 618 (1978) and *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 91 L.Ed.2d 174 (1986). Chief Judge Robinson ruled, however, that neither case specifically addressed the question of the right to a jury in Warsaw Convention cases and that "the law of the court" in a Warsaw Convention case was not limited to DOHSA. *Korean I*, 704 F.Supp. at 1152. The latter ruling is also the law of this case.

Chief Judge Robinson also concluded, by reference to DOHSA's legislative history, that Congress did not intend to eliminate the right to a jury whenever DOHSA also applies to the facts of a case. *Id.* In *Korean II*, the court also specifically noted that the Supreme Court, long ago, had approved the hearing of all claims a seaman might have in both law and admiralty in a single trial before a jury. *Korean II*, 1992 WL 200431 at 4-5 (citing *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963) and *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375 (1970)). In *Korean II*, the court concluded:

> it cannot be said that jury trials are repugnant to the DOHSA scheme, at least where there are concurrent claims triable by the jury joined with the DOHSA claim

Korean I, 704 F.Supp. at 1152. Consequently, DOHSA does not preclude jury trial where there is other applicable law — *e.g.*, the Warsaw Convention, itself.

The proper question, then, is "whether the law of th[e] court provides for a jury trial in wrongful death actions brought under

the Warsaw Convention." *Id.* at 1153. Chief Judge Robinson answered this question affirmatively. *Id.* at 1153. *See also In re Air Crash Disaster Near Honolulu, Hawaii*, 783 F.Supp. 1261, 1265 (N.D. Cal. 1992) ("*Hawaii II*") (claims under Warsaw Convention are triable by jury). It should also be noted that long before Chief Judge Robinson and the Court in *Hawaii II* made their rulings, a judge of this court determined that when plaintiffs bring Warsaw Convention claims as well as DOHSA claims, the right to a jury trial is not precluded. *In re Air Crash Disaster in the Ionian Sea on September 8, 1974 and All Other Related Actions*, MDL Docket No. 229, slip op. (S.D.N.Y. Apr. 10, 1979).

DAMAGES

Plaintiffs seek to recover money damages for decedent's conscious pain and suffering prior to death, for decedent's loss of the quality and enjoyment of life, and for decedent's future lost wages. They also seek to recover for their own personal mental anguish and grief, for their own personal suffering due to the loss of decedent's love and affection, for loss of support, lost inheritance, and lost services. Plaintiffs, therefore, claim personal damages, damages for wrongful death which are both pecuniary and non-pecuniary, and damages in a survival action on behalf of decedent's estate.

MURIEL MAHALEK AS PARTY PLAINTIFF

Defendant moves to dismiss Muriel Mahalek as a party plaintiff suing in her own right. Defendant argues that under DOHSA only the personal representative of the decedent's estate is permitted to bring a wrongful death action and is limited to

pecuniary losses. This court, however, has determined that actions under the Warsaw Convention are not restricted by DOHSA. The Warsaw Convention provides that suit for "damages sustained" may be brought "however founded" and "without prejudice to the questions as to who are the persons who have the right to bring suit." Warsaw Conv. art. 24(2) The Warsaw Convention, as the D.C. Circuit noted, does not limit recovery to the personal representative of the decedent and affirmatively provides for suit by persons other than passengers. *In re Korean Air Lines*, 932 F.2d at 1485-86. Therefore, defendant's motion is denied. Muriel Mahalek may proceed as a party plaintiff and if she can prove any personal loss, as allowed by this decision, may recover for same.

SURVIVAL ACTION

Decedent's Pain and Suffering

Defendant in moving to limit plaintiffs' recovery to pecuniary losses sustained by decedent's dependent survivors argues that DOHSA does not provide for survival actions brought to recover for conscious pain and suffering, a non-pecuniary loss. Defendant's motion is denied.

In *Eastern Airlines, Inc.* v. *Floyd*, ___ U.S. ___, 111 S.Ct. ___, 113 L.Ed.2d 569 (1991), the Supreme Court addressed the question whether purely mental injuries were compensable under the Warsaw Convention's language allowing recovery for *lesion corporelle* -- bodily injury. Plaintiffs in that case sought damages for mental distress when their plane narrowly avoided crashing during a flight between Miami and the Bahamas. The Court held that a passenger's injury caused by anxiety or shock is not recoverable when unaccompanied by physical injury.

It, therefore, logically follows that where there is physical injury, passengers, who plainly may bring a cause of action under the Warsaw Convention, may recover for injuries which accompanied such physical injuries. Plaintiffs intend to prove that the passengers aboard the ill-fated Flight KE007 were alive for a period of time after their plane was disabled by a Soviety plane's gunfire or missile and that the passengers suffered conscious physical pain and mental terror and anguish prior to their deaths. While the Court in *Floyd* expressly refused to consider the question whether conscious pain and suffering are recoverable in a survival action, since that was not the case before them, the Eastern district, since then, has considered the issue and has determined that damage awards for conscious pain and suffering sought in a survival action are provided for under the Warsaw Convention. *In re Inflight Explosion on Trans World Airlines*, 778 F.Supp. 625 (E.D.N.Y. 1991), *rev'd on other grounds*, 1992 WL 212001 (2d Cir. 1992), involved a terrorist attack on TWAA Flight 840. A jury determined that TWA's failures to take proper security measures were equivalent to "wilful misconduct." *Inflight Explosion*, 778 F.Supp. at 626. In considering the issue of damages for conscious pain and suffering to the passengers, the court in *Inflight Explosion* noted that DOHSA did not preclude recovery for consicous pain and suffering in Warsaw Convention cases:

> the process of fashioning federal common law under the Warsaw Convention does not actually involve applying the DOHSA. Thus, the DOHSA cannot be used to inhibit federal courts from recognizing a survival action under federal Warsaw Convention treaty common law or general maritime law.

Id. at 636. Citing the court's decision in *Lockerbie*, the court in *Inflight Explosion* affirmed plaintiffs' right to recover dam-

ages for the pain and suffering of the passengers because recovery for such conscious pain and suffering redresses actual harm, *dommage survenu* (damage sustained), as required under the Warsaw Convention, rather than generalized legal damages such as punitive damages. *Id.* at 636. This court sees no federal statutory or common law bar to the survival action brought by decedent's estate here to recover damages for decedent's conscious pain and suffering prior to her death. *See also In re Air Crash Disaster Near Honolulu, Hawaii*, 783 F.Supp. 1261, 1265) (N.D.Cal. 1992) ("*Hawaii II*") (considering the interplay of DOHSA and Warsaw Convention and concluding that "[p]laintiffs asserting causes of action on behalf of decedent passengers may recover for the pre-death pain and suffering of the decedent under the cause of action created by Article 17 of the Warsaw Convention.")

Additionally, defendant's motion to preclude the expert testimony of Robert L. Elzy and James F. Foody, neither of whose qualifications have not been questioned, is denied because Mr. Elzy's and Mr. Foody's testimony is relevant to this issue.

Loss Of The Enjoyment Of Life

Plaintiffs seek to recover for loss of the enjoyment of life as part of their survival action on behalf of the decedent's estate. Plaintiffs claim that federal courts have allowed damages for lost enjoyment of life as hedonic damages.[7] As support for this proposition, plaintiffs cite only one Circuit Court opinion, *Bell* v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (*citing Guyton* v. *Phillips*, 532 F.Supp. 1154 (N.D.Cal. 1981) *and Heath* v. *City of Hialeah*, 560 F.Supp. 840 (S.D.Fla. 1983)).

[7] "Hedonic damages" refers to damages for the loss of the enjoyment of life as affected by physical pain and suffering, physical disability, impairment and inconvenience affecting an individual's normal pursuits and pleasures of life.

Bell involved an unlawful killing by Officer Grady of the Milwaukee Police Department and a conspiracy to conceal the facts surrounding the shooting by several other police officers. Suit was brought under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 against Officer Grady and the other officers who participated in the cover-up. Plaintiffs brought survival actions on behalf of the decedent Bell's estate and wrongful death actions in their individual capacities. Plaintiffs claimed that Officer Grady and the other officers had 1) violated Bell's Fourth and Fourteenth Amendment rights through the use of excessive force and unlawful killing; 2) violated the Fourteenth Amendment rights of Bell's father, Dolphus Bell, by depriving him of an alleged liberty interest in the continued association with his son; 3) violated similar Fourteenth Amendment liberty and associational rights of Bell's siblings, and 4) violated the due process and equal protection rights of Bell's estate and siblings by conspiring to conceal the facts of the shooting.

The Seventh Circuit in *Bell* determined that Wisconsin statutory law creates a survival action in favor of a decedent's estate for *pre-death* injuries and a wrongful death action in favor of the decedent's survivors, but neither of these remedies allow recovery of damages for loss of life. *Bell*, 746 F.2d at 1236. Nevertheless, the court went on to determine that where state law is inconsistent with federal civil rights laws, state law should not apply; therefore, Wisconsin law could not "be applied to preclude the estate's recovery for loss of life . . ." *Bell*, 746 at 1236. The court noted that state law does not preclude damages for constitutional violations claimed under § 1983 because "[i]t is axiomatic that the Fourteenth Amendment protects individuals from deprivation by the *state* of life without due process." *Bell*, 746 F.2d at 1238 (citation omitted) (emphasis added). As a result, the court concluded that Section 1983 permits recovery for loss of life by the decedent's estate notwithstanding restrictive state laws. *Bell*, 746 F.2d at 1238.

The court's decision in *Bell* was inextricably linked to constitutional violations by state actors. The court noted that "the fundamental policies behind Section 1983 are twofold: compensation for and deterrence of unconstitutional acts committed under state law. One of the primary reasons Section 1983 was enacted was to remedy and deter racial killings and other acts violative of the Fourteenth Amendment." *Bell*, 746 F.2d at 1239 (citations omitted). The facts of *Bell*, § 1983 claims for constitutional violations by state actors, make it irrelevant to the case at hand.

Plaintiffs in this case also refer to two district court cased cited in *Bell*; *Guyton* v. *Phillips*, 532 F.Supp. 1154 (N.D.Cal. 1984) and *Heath* v. *City of Hialeah*, 560 F.Supp. 840 (S.D.Fla. 1983). Both of these cases also involved § 1983 actions brought against police officers for unlawful killings resulting in a deprivation of life without due process in violation of the Fourteenth Amendment to the Constitution. Plaintiffs here make no claims against state actors and no claims of violations of constitutional rights. While a survival action for loss of life may exist under § 1983 which protects against unconstitutional deprivations of life by state officials, defendant here is not related to any state and therefore not susceptible to the type of due process claims made in *Bell*.

In the context of some personal injury suits, courts have permitted recovery for loss of the quality or enjoyment of life. This recovery, however, has been allowed in non-death cases involving permanent injury because loss of the quality or enjoyment of life in sujch cases concerns loss which will be sustained during a victim's lifetime, and damages for such losses have been available to the victim, not as damages recoverable by a decedent's estate in a survival action. For example, in *Walsh* v. *Matthews Chrysler Leasing*, ___ F.Supp. ___, 1990 U.S. Dist. Lexis 13149 (September 29, 1990), a court in the Northern District of New York awarded damages for loss

of the quality of life to a teacher who had been injured in an automobile accident. The court found that Walsh had lived an active life before the accident, teaching classes, as well as bowling, golfing, gardening, and dancing. After the accident, however, she had experienced significant pain and had been unable to pursue these activities. Accordingly, the court awarded damages for loss of the quality of life as well as for pain and suffering and pecuniary damages. *Walsh*, 1990 U.S. Dist. Lexis 13149 at 9-12. *Poleto* v. *Consolidated Rail Corp.*, 826 F.2d 1270 (3d Cir. 1987) involved a FELA claim brought by a rail car inspector who was injured when he fell through rotted floorboards of a rail car. The Third Circuit Court affirmed the District Court's award of damages for the separate categories of "loss of quality or enjoyment of life from the date of the accident to the date of the verdict" and "future loss of quality or enjoyment of life" as well as pecuniary damages. *Poleto*, 826 F.2d at 1273 n.3. In *Christopher* v. *United States*, ___ F.2d ___, 1991 U.S.App. Lexis 7825 (April 23, 1991), the Ninth Circuit remanded the District Court's reduction of a general damage award in a personal injury suit. The court specifically instructed that the general damage award was to be apportionerd between "losses for physical impairment and disfigurement and losses for pain and suffering, inconvenience, emotional stress, and *impairment of quality of life*." *Christopher*, 1991 U.S.App. 7825 at 4 (emphasis added).

All of these cases involved plaintiffs, suing on their own behalf, for injuries to be suffered during their lifetimes. Loss of the quality or enjoyment of life is not a claim that has typically survived the victim in cases other than Civil Rights Cases as noted above. Therefore, Plaintiffs may not recover damages for loss of the quality or enjoyment of life of the decedent.

Future Lost Earnings

Defendant moves to deny recovery for lost future wages. Plaintiffs claim that the broad language of the Warsaw Convention which provides for recovery of "damage sustained" permits them to recover in a survival action for the wages that decedent would have earned but for the KE007 disaster.

On the other hand, defendant, relying on *Miles*, argues that recent Supreme Court precedent precludes the recovery of future lost earnings by decedent's relatives in this case. While defendant is correct that under *Miles* lost wages may not be recovered in wrongful death actions by survivors of a seaman, lost earnings may be proved for the purpose of determining loss of support and loss of inheritance.

In *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 113 L.Ed.2d 275 (1990), the mother of a seaman who had been stabbed by a fellow crew member while the ship was docked in the harbor sought to recover damages on behalf of her son's estate and herself. Her action could not be brought under DOHSA which applies only to death on the high seas. The Court's decision in *Moragne* found that a longshoreman could bring a wrongful death action under the general maritime law and recover for loss of society. But Ms. Miles' son was not a longshoreman. In resolving this issue, Justice O'Connor traced the history of survival and wrongful death actions for seamen and longshoremen. She discussed the inconsistency of remedies that had existed due to the interplay of statutory and common law rights in maritime cases. These inconsistencies were thought to have been resolved by the Court's decision in *Moragne*, giving longshoremen's survivors the right to bring an action under general maritime law for wrongful death when a longshoreman lost his wife within the three mile zone. Adopting the reasoning in *Moragne*, the Court in *Miles* declared the availability for the survivors of seamen, who lost their lives

within the three mile zone, of a general maritime cause of action for wrongful death. *Miles*, 112 L.Ed.2d at 289. However, loss of society damages were ruled out for all seamen and longshoremen in the interest of uniformity.

Despite the general maritime cause of action for wrongful death, however, the Court declined to decide whether survival actions may be brought under a general maritime cause of action. Instead, the Court addressed the narrower question of whether future lost earnings are recoverable by a seaman's estate, finding that there is no recovery for lost earnings beyond a seaman's lifetime.

Justice O'Connor concluded that recovery for lost future income there are dependent survivors of a seaman would often be duplicative of recovery for future loss of support. *Miles*, 112 L.Ed.2d at 292. Moreover, the Court noted that a large majority of states preclude recovery for lost future income in survival actions. *Miles*, 112 L.Ed.2d at 293. The Court also concluded that the cause of action for the wrongful death of a seaman created by DOHSA and the Jones Act does not include recovery for lost future earnings. *Miles*, 112 L.Ed.2d at 292.

Miles, however, is not direct precedent in this case. The Court in *Miles* merely sought to create uniformity in the remedies available to seamen and longshoremen. The Court considered the remedies made available by Congress in DOHSA, the Jones Act, and general maritime law and formulated a rule regarding remedies available to the survivors of seamen and longshoremen that would be uniform. The relevant substantive law in this case, as discussed above, is federal common law. While this court may consider DOHSA, the Jones Act, general maritime law, and the Court's decision in *Miles* as analogies, they are not directly relevant or binding. The causes of action created by the Warsaw Convention are broader than either DOHSA or the Jones Act. However, this court finds that where

there are surviving dependents, as here, who are entitled to seek loss of support, lost inheritance, and loss of services, as in this case, the argument against double recovery is persuasive. The court, therefore, rules that under the facts of this case lost future wages are not recoverable. Even if plaintiffs were not suing for loss of support, as they are now trying to do by advising the court in their supplemental brief on damages that they are not now seeking loss of support, the amount of lost future wages they might recover, as defendant points out, would be subject to reduction by the amounts which the jury finds decedent would have required for her own support and income taxes which she would have had to pay on future lost wages, the same as in loss of support cases. Plaintiffs, therefore, may not be any better situated in seeking lost future wages in lieu of loss of support, loss of inheritance, and loss of services.

WRONGFUL DEATH ACTION

Loss of Support

While plaintiffs in this case may not recover for lost future earnings, they may recover for loss of support. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 584, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), *rev'd on other grounds*, 498 U.S. 19 (1990) ("recovery for loss of support has been universally recognized"). The court in *Evich* v. *Morris*, 819 F.2d 256, 258 (9th Cir. 1987), *cert. denied*, 484 U.S. 914 (1987) noted that most states allow recovery in the form of loss of support, when wrongful death beneficiaries exist, rather than recovery for future lost wages. *Evich* involved non-dependent brothers of a deceased seaman who filed actions against the owner of the decedent's vessel and the owner of the vessel which attempted to rescue the decedent's vessel. On appeal, the court addressed

the question of whether a general federal maritime survival action preempts state law and what damages are recoverable in the federal action.

The court in *Evich* awarded damages for lost future earnings. The court reasoned that the award would prevent the anomaly of making it cheaper to kill a victim rather than simply injuring him. The award of lost future earnings, however, was specific to the facts of *Evich* where there were no dependent survivors entitled to recover for loss of support (here there are) and, therefore, no possibility of duplicative recovery — recovery for loss of support and lost future wages. *See Miles*, 112 L.Ed.2d at 292. On the other hand, where dependents do exist, the *Evich* court recognized that most states award damages for loss of support and do not allow damages for future economic loss. *See also O'Rourke* v. *Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984) (In action against airline under Warsaw Convention and against Government, court granted damages for loss of support in cliam against Government under the Federal Tort Claims Act). This court finds that under the facts of this case, damages for loss of support and loss of inheritance are recoverable, and future lost earnings and wages are provable to furnish a basis for determining those losses. Loss of support includes: regular contributions of money and periodic gifts. Defendant does not dispute the provability of future lost wages to serve the determination of loss of support and loss of inheritance.

The criteria for recovery for loss of support are the following: the decedent's age, health and life expectancy, her financial expectations and prospects for advancement, her earning ability and actual income, her living expenses and income taxes, her past actual financial contributions to the beneficiaries, as well as the number, age, and situation of those dependent on her for support, and the manner in which she would have supported them.

Because the appropriate criteria for assessing damages for loss of support are set forth above, defendant's motion to preclude the expert testimony of plaintiffs' economist, Conrad Berenson, is denied. Defendant claims that the information provided in discovery is not a sufficient basis from which plaintiffs' economist can testify as to future earnings. However, Mr. Berenson, whose qualifications are not questioned, would be able to testify as to loss of support based on the criteria set forth above. Therefore, defendant's motion to exclude the testimony of plaintiffs' economist is denied.

Plaintiffs' Mental Injury and Grief

Plaintiffs seek damages for their own personal mental anguish in grieving for their deceased daughter and sister. Defendant's again claim that DOHSA does not permit recovery for plaintiffs' grief in a wrongful death action. Generally, there is no recovery for mental anguish in grieving in a wrongful death action. Federal common law has traditionally not allowed recovery for grief. *Miles*, 112 L.Ed.2d at 291. *But see Diaz Lugo* v. *American Airlines, Inc.*, 686 F.Supp. 373 (D. Puerto Rico 1988) (allowing husband's recovery under the Warsaw Convention for emotional distress and loss of consortium for injury to his wife). As the Supreme Court noted in *Miles*, Lord Campbell's Act[8] was passed in England in 1846 to remedy the absence of a right of action for wrongful death. *Miles*, 112 L.Ed.2d at 290. The Act was the progenitor of many wrongful death statutes in the United States. In one of the early English decisions on this matter, Justice Coleridge commented that the title of Lord Campbell's Act appropriately fit its meaning: " An act for compensating the families of persons killed,' not for

[8] Lord Campbell's Act, 9 & 10 Vic. ch. 93 (1846).

solacing their wounded feelings. . . ." *See* STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH 327 (1975). Federal wrongful death statutes, like DOHSA, generally exclude damages for mental anguish and grief. As the Supreme Court in *Miles* also observed, a majority of states has also denied recovery for grief. *Miles*, 112 L.Ed.2d at 92. S. SPEISER', at 327-28.

Mental anguish and grief usually do not arise out of actual injury but arise out of the shock and trying experience of coping with the death of a loved one. Wrongful death recovery generally has been extended only to cover pecuniary losses which are measurable.[9] The exception to the general rule precluding recovery for grief occurs when a survivor's damages extend beyond mere grief to actual mental injury or the aggravation of a pre-existing physical injury. Mental injury exists if the survivor has been physically debilitated by grief stemming from the wrongful death of a loved one. Mental injury is often accompanied by physical manifestations, *Floyd*, 113 L.Ed.2d at 580 n.7, 583 & 588, and may require psychological counselling and/or medical treatment. Damages due to mental injury and associated with physical injury are, therefore, "damage sustained" (as required by *Lockerbie*, 928 F.2d at 1281) and estimable when one considers, for example, losses due to

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[9]S. Speiser at 332. The pecuniary loss rule, however, has been recognized as unduly harsh by an increasing number of jurisdictions which now allow recovery for some type of mental anguish and grief either through statute or judicial construction.

Several states have statutes authorizing damages for mental anguish and grief:

Arkansas (Ark. Stat. Ann. § 16-62-102 (1992))
Delaware (10 Del. Code Ann. § 3724)
Florida (Fla. Stat. Ann. § 766.202 (1991))
Kansas (Kan. Stat. Ann. § 60-1904)
Maryland (Ann. Code of Maryland, Courts, Judicial Proceedings § 3-904(e))
Ohio (Ohio Rev. Code § 2125.02(B)(5))
Virginia (Code of Virginia § 8.01-25 (1992))
West Virginia (West Virginia Code § 55-7-6 (1992))

time out of work, hospitalization, physical injury, or medical and counselling expenses.

The issue of recovery for injury to the survivors of an air disaster under the Warsaw Convention was also discussed by the D.C. Circuit in considering KAL's liability on appeal from a jury verdict finding "wilful misconduct" and awarding punitive damages. *In re Korean Air Lines Disaster of September 1, 1983, Korean Air Lines Company, Ltd,* 932 F.2d 1475, 1487 (D.C. Circuit 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 616 (1991). The D.C. Circuit court observed the fact that the Warsaw Convention does not specify that the damage must be sustained by the passenger in order for damages to be recoverable under the Warsaw Convention. The D.C. Circuit quoted the language of the Warsaw Convention, itself: "liable for damage sustained" and noted that the language of the Warsaw Convention was very broad. *In re Korean Air Lines*, 932 F.2d at 1485. This court, therefore, concludes that the Warsaw Convention permits a non-passenger, surviving close relatives, who can prove actual injury to himself or herself, such as actual mental injury accompanied by physical manifestations or aggravation of a pre-existing physical condition as a result of an airplane accident, to recovery for mental injury sustained. While plaintiffs in this case may not recover for grief, *per se*, they may recover for proved actual mental injury, evidenced by physical manifestations resulting from grief or the aggravation of a pre-existing physical injury resulting from grief.

It should also be noted that the Court's decision in *Floyd* concerned mental injury to passengers and not to surviving relatives. *Id.* at 580 n.7. Here we are concerned with the mental injury to surviving relatives and apply the standard used in *Floyd*.

Relevant to the individual plaintiffs' present actual mental injury is the knowledge that Muriel Kole's death was not the

result of mere negligence but the result of defendant's "wilful misconduct." Plainly a surviving relative's mental injury could be aggravated by the knowledge that the decedent lost his or her life not as a result of the airline's mere negligence but as a result of the airline's "wilful misconduct." "Wilful misconduct" is obviously a higher standard of wrongdoing than mere negligence. Because defendant's "wilful misconduct" would be a factor in assessing plaintiffs' present actual mental injury, defendant's motion to preclude any reference to KAL's "wilful misconduct," as found by the liability jury, is denied. In an ordinary case, the same jury would decide both liability and damages. The bifurcation here results from the fact that this was a multidistrict case.

Loss of Love and Affection and Companionship

Plaintiffs, as the surviving mother and sister, seek to recover for their loss of decedent's love, affection, and companionship. Recovery for loss of love, affection, and companionship differs from recovery for mental injury in that mental injury is acute and suffered by the survivor as a debilitating condition. Loss of love, affection, and companionship, on the other hand, is an injury suffered over a longer period in duration. The difference between the two injuries is the difference between personal injury and the deprivation or loss of something dear to the one deprived which affects the quality of the survivor's life in a significant way.

Defendant argues that loss of society (which covers the same ground) is not recoverable under DOHSA and that the Supreme Court's decision in *Miles* precludes recovery for loss of society. Defendant's argument is not persuasive. The Court's decision in *Miles* applies only to actions brought under the Jones Act, DOHSA, and general maritime law. Moreover, the facts of

Miles limit it to seamen. *Miles* does not limit remedies available under the Warsaw Convention. Moreover, this court has concluded that the Warsaw Convention is not limited by DOHSA.

Again, in reading the language of the Warsaw Convention, the D.C. Circuit noted that the Warsaw Convention does provide for non-pecuniary losses. The D.C. Circuit noted that the language of Article 17 of the Warsaw Convention in allowing recovery for "damage sustained" refers to "actual harm experienced, whether physical injury to the passenger or, in the case of death, monetary *or other loss* to his survivors." *In re Korean Air Lines*, 932 F.2d at 1485 (citing *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267 slip op. 2927 at 2959 (2d Cir. 1991)) (emphasis added). The D.C. Circuit Court interpreted "damage sustained" to include "suffering due to the death of a member of the family." *In re Korean Air Lines*, 932 F.2d at 1487.

In addition to the observations of the D.C. Circuit and the Second Circuit, it should be noted that the Fifth Circuit has twice allowed damages for loss of love and affection in cases brought under the Warsaw Convention and the Federal Tort Claims Act. In *In re Air Crash Disaster Near New Orleans, LA*, 789 F.2d 1092 (5th Cir), *vacated on other grounds*, 490 U.S. 1032 (1989), relatives of passengers killed in the crash of Pan American World Airways Flight 759 brought suit against Pan Am under the Warsaw Convention and against the United States under the Federal Tort Claims Act. A jury awarded plaintiff $250,000 for "the loss of the love and affection of his mother," and $150,000 for "the loss of the love and affection of his sister." *In re Air Crash Disaster Near New Orleans*, 789 F.2d at 1099. After discussing the intimate relationship that had existed between plaintiff and his deceased mother and sister, the court affirmed the jury verdict as to the loss as to plaintiff's mother and approved $50,000 of the original jury verdict as to the loss of plaintiff's sister. *In re Air Crash Disaster New New Orleans*, 789 F.2d at 1100.

Winbourne v. *Eastern Airlines, Inc.*, 758 F.2d 1016 (5th Cir.), *cert. denied*, 474 U.S. 1036 (1985) involved a suit brought against Eastern Airlines under the Warsaw Convention and against the United States under the Federal Tort Claims Act. Both Eastern and the Government conceded liability. Describing plaintiff as a man crushed by sudden tragedy, the Fifth Circuit affirmed the district court's award of damages for the loss of love and affection of plaintiff's wife and daughters. While Eastern's share of the total damage award was limited by the $75,000 limitation of the Montreal Agreement, the Circuit Court affirmed recovery of damages due to the loss of love and affection. *See also Caldarera* v. *Eastern Airlines, Inc.*, 705 F.2d 778 (5th Cir. 1983). (In suit brought against the airline under diversity jurisdiction applying Louisiana law and against the Government under the Federal Tort Claims Act, Circuit Court permitted award for damages including recovery for loss of companionship, love, and affection and physical and mental anguish); 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH 313-22 (2d 1975) (majority of jurisdictions allow recovery for society and companionship and several jurisdictions bound by pecuniary loss rule nevertheless allow recovery for "pecuniary value" of society, companionship, counsel, protection and attention).

Because the Second Circuit in *Lockerbie* determined that federal common law applies in interpreting the Warsaw Convention, the measure of damages available under the Convention is governed by federal common law.

Allowing survivors who are close family members of airline passengers to recover damages for the loss of love, affection and companionship when proved, in an action brought under the Warsaw Convention, is not repugnant to federal common law as presently developed and, moreover, serves the underlying purposes and goals of the Convention. Although pecuniary losses are the only losses recoverable under DOHSA, *Miles*,

112 L.Ed.2d at 290, that federal statute, governing a seaman's death on the High Seas, is not the limit of our search for a remedy under the Convention, especially when the $75,000 limit has been removed. When the limit has been removed by a finding of "wilful misconduct," the policy and underlying purpose of the Convention is to allow for full compensation, not only to the victims of an airline disaster, but to anyone who can prove that he or she sustained damages as a result of the crash of an airlines. *In re Korean Air Lines*, 932 F.2d at 1485 (citing *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267 slip op. 2927 at 2959-60 (2d Cir. 1991)).

Plaintiffs intend to prove a close, loving relationship between the decedent and her mother and sister in this case. The court, therefore, looks to recent developments in the area of federal common law in other areas outside federal maritime law. There was a time when federal maritime law was the only source of federal tort law. However, in more recent years, the Congress has expanded the areas of federal law giving rise to tort actions, and the federal courts in the last few decades have been busily engaged in construing these new laws and fashioning federal remedies. Perhaps the most prominent area of recent development has been civil rights tort actions provided for by the Congress.

In *Bell* v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), in developing the federal common law in relation to suits under § 1983, the Seven Circuit recognized as an element of damages recoverable in such cases an award for loss of society and companionship and rejected the state bar with respect to the amount recoverable. The court expressly ruled that in implementing a federal policy underlying a federal statute, federal courts should not allow an applicable state statute inconsistent with federal policy and purpose to control. *Bell*, 746 F.2d at 1251. The court held that § 1983 was designed to allow full

recovery for the unconstitutional deprivation of life by a state official. *Bell*, 746 F.2d at 1251.

The Warsaw Convention, a federal statute, has as its underlying purpose awarding full recovery in cases where there has been a finding of "wilful misconduct," as in the instant case. *Lockerbie*, 928 F.2d at 1285-86. Where a treaty conflicts with a prior statute, the treaty supersedes the statute. *See MacNamara* v. *Korean Air Lines*, 863 F.2d 1135, 1146 (3d Cir. 1988), *cert. denied*, 493 U.S. 944 (1989). When the Senate ratified the Warsaw Convention in 1934, DOHSA was already on the statute books. If the recovery allowed by DOHSA, a prior federal statute, should conflict with the Convention in its purposes, then, of course, the Convention, which is a treaty, should prevail. *See MacNamara*, 863 F.2d at 1146. It is certainly not clear that the Senate intended to limit the recovery of airline passengers' survivors because of the existence of DOHSA and its limitations to pecuniary losses.

Disallowing recovery for loss of love, affection and companionship and other non-pecuniary losses would mean that in those cases where the survivors were not dependent on the decedent for financial support, an action under the Convention would net "little more than the cost of a casket." *Heath* v. *City of Hialeah*, 560 F.Supp. 840, 842 (S.D.Fla. 1983).

This court concludes that the loss of love, affection and companionship of a decedent by a close relative is compensable under the Warsaw Convention. Therefore, plaintiffs may recover for the losses they suffered "due to the death of a member of the family." *In re Korean Air Lines*, 932 F.2d at 1487.

LOSS OF INHERITANCE

While plaintiffs did not specifically seek damages for loss of inheritance, Rule 54(c) of the Federal Rules of Civil Procedure

authorizes the court to award appropriate damages even though they are not formerly pleaded.[10] Lost inheritance is recoverable in most jurisdictions,[11] and federal common law permits recovery for lost inheritance.[12] One early commentator wrote:

> Where the evidence shows that it is probable that the decedent, but for [decedent's] death would have accumulated property, which if he had died intestate, would have been inherited by the beneficiaries of the action, these facts constitute such a reasonable expectation of pecuniary benefit as to authorize a recovery of damages for its loss.

TIFFANY, DEATH BY WRONGFUL ACT 378 (2d ed. 1913) (*reprinted in* SPEISER at 278). Plaintiffs may recover for lost inheritance. Defendant agrees. (Memorandum of Points and Authorities in Support of Defendant Korean Air Lines Co., LTD's Motion to Strike Plaintiffs' Jury Demand, To Determine The Law Applicable to the Determination of Damages and to

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[10] Rule 54(c) states:

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

F.R.C.P. § 54(c).

[11] S. SPEISER, at 277.

[12] C. McCORMICK, DAMAGES 350 (1935). A survey of American jurisdictions reveals:

> Although there are decisions to the contrary, there is substantial authority in support of the proposition that a beneficiary's loss of an expected inheritance, or of prospective accumulations, caused by a decedent's wrongful death, is recoverable as an element of damages under a wrongful death statute, and this rule is equally applicable to federal and state wrongful death statutes.

Wrongful death damages for loss of expectancy of inheritance from decedent, 91 ALR2d 477, 478.

Dismiss Muriel Mahalek as a Party Plaintiff at 39 ("Defendant's Brief").

Lost inheritance is based on the probability of wealth accumulation by the decedent and the probability that the decedent would have left it to the plaintiffs. Future lost earnings and wages are also provable for the determination of lost inheritance.

LOSS OF SERVICES

Plaintiffs seek damages for loss of services. Defendant does not contest this recovery. (Defendant's Brief at 39-40). Loss of services is a compensable pecuniary loss and damages may be awarded where the value of services lost is measurable. *Gaudet*, 414 U.S. at 584 *rev'df on other grounds*, 498 U.S. 19 (recovery for loss of services recognized at common law). At the time of Muriel Kole's death, Marjorie Zicherman was pregnant and had planned to rely on her sister's services in raising and caring for her child. Plaintiffs may recover for measurable loss of services.

TESTIMONY OF MICHAEL KOLE

Plaintiffs moved to exclude the testimony of Michael Kole. Michael Kole is the decedent's husband. His motion to intervene in this action as a party plaintiff was denied by this court by memorandum opinion dated June 25, 1992 because his intervention would be prejudicial to plaintiffs. Mr. Kole appealed the denial of the motion to intervene; however, the Second Circuit dismissed the appeal on September 29, 1992.

Just as Mr. Kole's intervention would unduly prejudice plaintiffs, his testimony as a witness for defendant would

likewise be unduly prejudicial. Mr. Kole has brought an action arising out of the air disaster in this case in his own behalf in a federal district court in California. Therefore, plaintiffs' motion to exclude the testimony of Michael Kole is granted under Rule 403 of the Federal Rules of Evidence.

Conclusion.

All of the foregoing claimed losses must be proved at trial. The references to DOHSA do not foreclose plaintiffs' rights under the Warsaw Convention, and plaintiffs retain their right to a jury trial. Decedent's mother, Muriel Mahalek, may proceed as a party plaintiff. Plaintiffs cannot recover for decedent's loss of the quality or enjoyment of life. Plaintiffs may recover for decedent's conscious pain and suffering, for loss of support, mental injury and grief as defined by this decision, loss of love, affection and companionship, loss of inheritance, and lost services. The testimony of decedent's husband, Michael Kole, is excluded.

Dated: November 19, 1992
New York, N.Y.

CONSTANCE BAKER MOTLEY
United States District Judge

No. 94-1361

MAR 6 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, individually and as executrix of the estate of Muriel A.M.S. Kole, and Muriel Mahalek,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Are nonpecuniary damages for loss of society recoverable by a nondependent sibling and parent for a death occurring on the high seas during the course of international air transportation?

2. Are nonpecuniary damages for survivor's grief recoverable for a death occurring on the high seas during the course of international air transportation?

3. Are pecuniary damages for loss of support and inheritance recoverable by a nondependent sibling for a death occurring on the high seas during the course of international air transportation?

LIST OF ALL PARTIES AND RULE 29.1 LISTING

A. Petitioners

The Petitioners are Marjorie Zicherman and Muriel Mahalek, who were the plaintiffs-appellees/cross-appellants in the Court of Appeals.

B. Respondent

The Respondent is KOREAN AIR LINES CO., LTD. (hereinafter "KAL") who was the defendant-appellant/cross-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. The 23 affiliated companies of The Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuck Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Hanjin Data Communications Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecomm. Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd. Co., Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.
Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation - SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuck Foundation

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G. Miller, *Liability in Int'l Air Transport* at 112 (Kluwer 1977) 11

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 43 F.3d 18 (2d Cir. 1994) and is reproduced in the Appendix to the Petition for Writ of Certiorari at A1-11. References preceded by "A" refer to pages in the Appendix to the Petition. The opinion of the district court is officially reported at 807 F. Supp. 1073 (S.D.N.Y. 1992) (A12-42).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 5, 1994.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable statute is the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.* ("DOHSA"). The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix hereto at RA5-8.

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[1] Although the Petition for Writ of Certiorari at 2 (hereinafter "Petition"), states that the date of the Opinion is November 3, 1994, Petitioners actually are referring to the Opinion issued on December 5, 1994, which replaced the Opinion issued on November 3, 1994, following the filing of a Petition for Rehearing by KAL. *See* Judgment and Order dated December 5, 1994 reproduced in the Appendix hereto at RA1. References preceded by "RA" refer to pages in the Appendix hereto.

STATEMENT OF THE CASE

A. Nature of the Case

This Petition involves only the question of the properly recoverable damages for the death of MURIEL KOLE (hereinafter "the decedent"), a passenger killed on KAL flight KE007, which was shot down by Soviet military aircraft on September 1, 1983. The Petitioners are Marjorie Zicherman, the decedent's adult sister, and Muriel Mahalek, the decedent's mother, who sought damages individually and on behalf of the estate of the decedent.

The action is governed by the Warsaw Convention, as supplemented by the Montreal Agreement,[2] and the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.* ("DOHSA"). The Warsaw Convention, together with the Montreal Agreement, serves to limit an air carrier's liability for passenger injury or death to the sum of $75,000 per passenger, unless the injury or death was proximately caused by the "wilful misconduct" of the air carrier within the meaning of Article 25 of the Convention. Although the Warsaw Convention has been held to create a wrongful death action for passengers killed during "international transportation by air,"[3] the Convention is silent on the types of recoverable compensatory death damages and the proper beneficiaries. These issues intentionally were left by the drafters of the Convention for determination by the internal damage law of each contracting party to the Convention. Warsaw Convention, Article 24, 49 Stat. 3020 (RA5).

DOHSA is the internal damage law of the United States applicable to all deaths occurring on the high seas. 46 U.S.C.

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[2] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302).

[3] *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 412 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

§ 761 (RA7). It is undisputed that the death of the decedent occurred on the high seas within the meaning of DOHSA. DOHSA specifically limits recoverable damages to pecuniary damages only and does not permit the recovery of nonpecuniary damages, such as loss of society and survivor's grief damages.[4]

B. The Course of Proceedings and Disposition Below

1. The Multidistrict Liability Trial

All federal court actions arising out of this air crash disaster were transferred by the Judicial Panel on Multidistrict Litigation ("JPMDL") to the United States District Court for the District of Columbia and Judge Aubrey E. Robinson, Jr. for coordinated and consolidated pre-trial proceedings on the common liability issues. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 575 F. Supp. 342 (J.P.M.D.L. 1983). The issue of whether the destruction of KAL flight KE007 was proximately caused by the "wilful misconduct" of KAL within the meaning of Article 25 of the Warsaw Convention was tried to a jury in the District of Columbia. The jury returned a verdict against KAL and assessed punitive damages of $50,000,000. On appeal, the Court of Appeals for the District of Columbia Circuit vacated the punitive damages award, holding as a matter of law that the Warsaw Convention does not permit the recovery of punitive damages, but affirmed the jury verdict of "wilful misconduct". *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air II*").

The common liability issue having been determined, this case was remanded by the JPMDL to the Southern District of New York, as the original transferor court, for trial on the issue of recoverable compensatory damages.

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[4] *See* 46 U.S.C. § 762 (RA7); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30-33 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-25 (1978).

2. The Damage Trial in the District Court

Following remand and prior to the damage trial, KAL moved, *inter alia*, for a determination that DOHSA, as the federal law directly applicable to all deaths occurring on the high seas, controls the question of recoverable damages and that DOHSA provides for the recovery of pecuniary losses only and precludes the recovery of nonpecuniary damages for loss of society and survivor's grief. A15. The district court denied KAL's motion and held that Petitioners were entitled to recover nonpecuniary damages for loss of society and survivor's grief. A32-39. At the conclusion of the damage trial, the jury awarded pecuniary and nonpecuniary damages as follows:

A. *Muriel Mahalek (decedent's mother)*

(1) Past and Future Mental Injury (grief damages):	$96,000
(2) Past and Future Loss of Love, Affection and Companionship (loss of society damages):	$28,000

B. *Marjorie Zicherman (decedent's sister)*

(1) Past Loss of Support:	$ 5,000
(2) Past and Future Mental Injury (grief damages):	$65,000
(3) Past and Future Loss of Love, Affection and Companionship (loss of society damages):	$70,000
(4) Loss of Inheritance:	$11,000
(5) Loss of Services:	$ 0[5]

[5] The jury also awarded $100,000 to the estate for decedent's pre-death pain and suffering. A4.

3. The Decision of the Court of Appeals

Article 17 of the Convention creates liability for a passenger death occurring during the course of international transportation by air within the meaning of the Warsaw Convention. Article 17, 49 Stat. 3018 (RA5). The Court of Appeals recognized, however, that the Convention is silent on the types of recoverable damages and the beneficiaries thereof and directs the courts to the applicable internal law of the contracting states for determination of these issues. (A5).

The court held that federal common law is the applicable internal damage law and further held that the best source of federal common law is general maritime law. A5-6. Although the death of the decedent occurred on the high seas within the meaning of DOHSA, which sets forth the types of recoverable damages and the beneficiaries thereof, the Court of Appeals rejected DOHSA as the applicable internal law. A5-7. Rather, the Court adopted, as the applicable internal damage law, the general maritime law principles of *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), and concluded:

1. loss of society damages are recoverable, even though the death occurred on the high seas within the meaning of DOHSA, which prohibits the recovery of such damages (A5-7);

2. "only dependents may recover damages for loss of society." (A7-8);

3. under the general maritime law, damages for survivor's grief are not recoverable (A8-9); and

4. pecuniary damages for loss of support and inheritance are recoverable by a sibling of the decedent, conditioned on a showing of financial dependency (A10).

The Court of Appeals set aside the awards of grief damages to decedent's sister and mother. A8-9. The court, finding that the mother was not financially dependent upon the decedent, set aside the loss of society damages awarded to her. A7-8. The court remanded for further consideration the question

whether the decedent's sister was financially dependent upon the decedent at the time of death. A8, A10. Petitioners thereafter filed this Petition for Writ of Certiorari.

REASONS FOR DENYING THIS WRIT

The questions presented for review by Petitioners as to the recoverability of survivor's grief damages and the proper beneficiaries of an award for loss of society and pecuniary damages do not involve issues that justify the grant of Petitioners' writ of certiorari. The questions raised by Petitioners were decided by the court below in accordance with well settled principles of federal and general maritime law. The only portion of the Court of Appeals' decision which *is* contrary to federal and general maritime law and merits review, is the court's initial holding that loss of society damages are recoverable for a death on the high seas.[6] This erroneous holding forms the basis of KAL's Cross-Petition for a Writ of Certiorari.

I

THE DECISION THAT NONPECUNIARY DAMAGES FOR LOSS OF SOCIETY ARE RECOVERABLE ONLY BY FINANCIALLY DEPENDENT RELATIVES IS IN ACCORDANCE WITH DECISIONS OF THE SECOND, FIFTH AND SIXTH CIRCUITS BUT IS IN CONFLICT WITH THE NINTH CIRCUIT

Petitioners are correct that a conflict exists between the decision of the Court of Appeals below and the Ninth Circuit. Petition at 6-7. The court below held that nonpecuniary damages for loss of society are recoverable under general maritime law but only by financially dependent relatives. The decision as to the requirement for dependency is in accord

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[6] *See* 46 U.S.C. § 762 (RA7); *Miles*, 498 U.S. at 30-33; *Higginbotham*, 436 U.S. at 622-25.

with decisions of the Second, Fifth and Sixth Circuits. *See Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990); *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989), *aff'd sub nom. on other grounds, Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

The decision of the Ninth Circuit in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), which involved wrongful death actions by nondependent parents of decedents killed in the territorial waters of the United States, is to the contrary. The court in *Sutton* held that dependency is not relevant to the recovery of loss of society damages under general maritime law and allowed nondependent parents of the decedents to recover loss of society damages. 26 F.3d at 916-17.

If the Court determines that the Petition should be granted to resolve this conflict among the Circuit Courts of Appeals as to the prerequisite of financial dependency for a loss of society damage award for a death on the high seas, then the Court should also review and determine the question whether nonpecuniary loss of society damages are recoverable at all for a death on the high seas, as set forth in KAL's Cross-Petition for a Writ of Certiorari.

II

THE DECISION THAT DAMAGES FOR SURVIVOR'S GRIEF ARE NOT ALLOWED DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS AND IS IN ACCORD WITH THE UNIVERSAL RULE THAT SUCH DAMAGES ARE NOT RECOVERABLE UNDER ANY FEDERAL STATUTE, FEDERAL COMMON LAW OR GENERAL MARITIME LAW

The decision of the court below that grief damages are not recoverable does not conflict with any decision of this Court

or any other Court of Appeals and does not involve an important issue requiring review by the Court.

A. There Is No Conflict With Any Federal Law or Decision

Petitioners argue that there are two lines of cases that address recovery of grief damages under federal law: (1) general maritime law, which denies recovery, and (2) civil rights cases, which allow recovery. Petition at 5, 7-9. While Petitioners do not dispute that the court below properly looked to maritime law in determining the types of recoverable compensatory damages (Petition at 7), Petitioners now argue that the court below erred in applying general maritime law to conclude that damages for survivor's grief are not recoverable. Petition at 7-9. Whether one looks to federal common law, general maritime law, federal statutes or civil rights cases, the result is the same—grief damages are not recoverable under general maritime law, federal statutes or federal common law. *See Higginbotham*, 436 U.S. at 621-22 (DOHSA); *Gaudet*, 414 U.S. at 585 n.17 (general maritime law); *Michigan Central Railroad Co., v. Vreeland*, 227 U.S. 59, 70 (1913) (Federal Employers' Liability Act, 45 U.S.C. § 59); *Wahlstrom*, 4 F.3d at 1093 (general maritime law); *Gaston v. Flowers Transp.*, 866 F.2d 816, 819-21 (5th Cir. 1989) (Jones Act, 46 U.S.C. § 688); *Cook v. Ross Is. Sand & Gravel Co.*, 626 F.2d 746, 748-49 (9th Cir. 1980) (Jones Act); *Oldham v. Korean Air Lines*, No. 83-3889, 1994 Westlaw 725277 (D.D.C. Oct. 11, 1994), *appeal filed*, No. 94-5321 (D.C. Cir. 1994) (tort law prohibits recovery for mental injuries to plaintiffs outside of the "zone of danger").

The civil rights cases cited by Petitioners as examples of cases allowing recovery do not support their position. *See* Petition at 7-8 citing *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Berry v. City of Muskogee, Oklahoma*, 900 F.2d 1489 (10th Cir. 1990); *Henry v. Gross*, 803 F.2d 757 (2d Cir. 1986). None of these decisions addresses the recoverability of survivor's grief damages in a wrongful death action.

The court in *Bell*, 746 F.2d 1205, addressed the issue of whether plaintiffs could recover emotional distress damages for a deprivation of their constitutional rights. 746 F.2d at 1265-66. The *Bell* court merely held that plaintiffs may recover emotional distress damages resulting from the conspiracy/cover-up that delayed for 20 years the assertion of their civil rights claim under 42 U.S.C. § 1985. *Id.*

In *Berry*, 900 F.2d 1489, the court concluded that a federal remedy must be fashioned to be applied to civil rights death cases under 42 U.S.C. § 1983 and that remedy should be a "survival" remedy brought by the estate of the deceased victim. 900 F.2d at 1506-07. The court went on to hold that a state wrongful death action would not be precluded, so long as there is no duplication in recovery. 900 F.2d at 1506-07. Because a claim for grief damages is a wrongful death claim, and not a survival claim, recovery in *Berry* would have been based on the applicable state wrongful death statute and not on any federal law.

Henry, 803 F.2d 757, involved an action by a recipient of public assistance challenging the termination of benefits. The court held that an award of $500 for "personal humiliation" and "mental anguish," due to a violation of the claimants' civil rights, was proper. 803 F.2d at 768. Unlike grief damages, the mental anguish damages in *Henry* were for injury to the individual whose civil rights were violated and not for any injury of family members.

On the basis of the *Bell*, *Berry* and *Henry* decisions, Petitioners incorrectly argue that a decision must be made by the Court on which line to follow in Warsaw Convention cases involving a death occurring on the high seas. Petition at 5, 7-9. However, there is no decision to be made, because neither "line" of case law support recovery for *survivor's* grief damages in a death case.

B. There Is No Question of General Importance Involved

Petitioners argue that the drafters of the Convention understood that the phrase "damage sustained" in Article 17 of the Convention to include the mental injury of a surviving family member. Petition at 8-9. Article 17 provides:

> The carrier shall be liable for *damage sustained* in the event of the death or wounding *of a passenger* or any other bodily injury suffered *by a passenger,* if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (emphasis added) (RA5).

By use of the phrase "damage sustained" in Article 17, the drafters did not intend to define the types of "compensatory damages"[7] recoverable in an action to which Article 17 applies. Rather, the intention of the drafters and the shared expectations of the contracting parties was that Article 17 simply created carrier liability for "damage sustained" and that "the proper 'measure' of recoverable [compensatory] damages under Article 17 is left to the domestic law of the contracting states." *Korean Air II*, 932 F.2d at 1488; Article 24, 49 Stat 3020 (RA5). *Accord In re Air Disaster at Lockerbie I, Scotland on Dec. 21. 1988*, 928 F.2d 1267, 1274-83 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 412-415 (9th Cir. 1983); *Mertens v. Flying Tigers Lines, Inc.*, 341 F.2d 851, 855, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

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[7] The phrase "compensatory damages" is used herein to refer to damages except punitive and purely mental anguish damages, which are precluded by Article 17. *See Eastern Airlines v. Floyd*, 499 U.S. 530 (1991)(damages for mental anguish, standing alone, are not recoverable under the Convention because they cannot be considered a "bodily injury" within the meaning of Article 17); *Korean Air II*, 932 F.2d at 1485-90 (punitive damages are not recoverable under the Convention because the Article 17 phrase "damage sustained" is compensatory in nature).

There is nothing in the phrase "damage sustained" which allows for the recovery of nonpassenger grief damages. The determination of whether such damages are recoverable is made solely on the basis of the domestic law of each contracting state. *Mertens*, 341 F.2d at 858 ("It seems clear that the Warsaw Convention left this issue [recovery of grief damages], as it did other issues . . . to the internal law of the parties to the Convention").[8]

The only authority cited in support of Petitioners' interpretation of Article 17 is *Korean Air II*, 932 F.2d at 1487. Petition at 8-9. The issue before the Court of Appeals in *Korean Air II* was whether the Convention permitted the recovery of punitive damages. The issue of the types of recoverable compensatory damages was not argued, briefed, or addressed by the court in *Korean Air II*. The Court of Appeals simply interpreted Article 17 and "damage sustained" to be compensatory and not punitive in nature. *Korean Air II*, 932 F.2d at 1485-86. The *Korean Air II* court recognized that "the proper 'measure' of recoverable [compensatory] damages under Article 17 is left to the domestic law of the contracting states." *Korean Air II*, 932 F.2d at 1488.

The portion of the *Korean Air II* decision relied upon by Petitioners is *dicta*. Petition at 8. Moreover, the portion relied upon was a quote from a commentator addressing what damages are allowed by the national civil law of France and was cited by the *Korean Air II* court merely to distinguish the concept of compensatory from punitive damages. *See Korean Air II*, 932 F.2d at 1487, *quoting* G. Miller, *Liability in Int'l Air Transport* at 112 (Kluwer 1977).[9]

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[8] Moreover, the fact that the Convention contains a limitation of liability (Article 22) is irrelevant to what types of compensatory damages are recoverable. *See* Petition at 8. The limitation of liability affects only the *amount* of damages that a plaintiff may recover, not the types of compensatory damages recoverable. The same types of compensatory damages are recoverable whether the limitation applies or not.

[9] The same commentator, later addressing the types of compensatory damages recoverable under the Convention, states that "Article 17

Similarly, Petitioners' statement that the Court in *Floyd*, 499 U.S. 530, "implied" that grief damages are recoverable under the Convention is incorrect. Petition at 9. *Floyd* addressed the issue of the recovery of mental anguish damages sustained by "*passengers*" on board an aircraft. The Court held that purely mental anguish damages are not recoverable by *passengers* under Article 17 of the Convention because such damages cannot be considered "bodily injury suffered by a passenger". The Court did not address the question whether grief damages or mental injury damages are recoverable by a *non-passenger* as "damage sustained" for the death of a *passenger*.

Petitioners fail to demonstrate that any conflict or important question or controversy exists as to the recovery of grief damages, which warrants review by the Court. Indeed, Petitioners are unable to cite to any authority that has allowed recovery of survivor's grief damages under any applicable federal law.

III

THE PETITION FAILS TO STATE A REASON WHY THE DECISION THAT SIBLINGS MUST PROVE DEPENDENCY TO RECOVER ANY PECUNIARY LOSS IS INCORRECT AND SHOULD BE REVIEWED

Although raised as a question presented (Petition at i), Petitioners do not advance any valid reason why the Court should review the decision of the court below that pecuniary damages may only be recovered by a sibling who was financially dependent upon the decedent at the time of death. Petition at note 4.

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does not regulate the question of recoverable damages but only sets the conditions necessary for a carrier to be liable" and that the type of recoverable damages is determined by reference to the domestic law. *Miller*, at 125.

In fact, the decision of the Court of Appeals is consistent with well settled authority that the threshold requirement for the recovery by a sibling of *any* pecuniary damages under DOHSA[10] *or* general maritime law is that the sibling was financially dependent upon the decedent at the time of death. *See Wahlstrom*, 4 F.3d at 1090; *Evich v. Connelly*, 759 F.2d 1432, 1433 (9th Cir. 1985); *First Nat'l Bank in Greenwich v. National Airlines, Inc.*, 288 F.2d 621, 624 (2d Cir.), *cert. denied*, 368 U.S. 859 (1961); *In re ABC Charters*, 558 F. Supp. 364, 366 (W.D. Wash. 1983); *Glod v. American President Lines*, 547 F. Supp. 183, 185 (N.D. Cal. 1982); *Muirhead v. Pacific Inland Navigation, Inc.*, 378 F. Supp. 361, 362 (W.D. Wash. 1974).

The decision of the court below is consistent with the general maritime law, which requires a showing of financial dependency for a sibling to recover any pecuniary damages. There is no need for the Court to review this aspect of the decision of the court below.

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[10] The schedule of beneficiaries in DOHSA limits the beneficiaries to the "decedent's wife, husband, parent, child or *dependent relative*". 46 U.S.C. § 761 (emphasis added) (RA7).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: March 6, 1995

Respectfully submitted,

TOMPKINS, HARAKAS, ELSASSER
& TOMPKINS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 93-7490, 93-7546

Filed December 5, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of December, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE J. EDWARD LUMBARD,
HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE RALPH K. WINTER,
Circuit Judges.

MARJORIE ZICKERMAN, individually and as executrix under the estate of Muriel A.M.S. Kole; MURIEL MAHALEK, mother and next of kin of Muriel A.M.S. Kole,

Plaintiffs-Appellees/
Cross-Appellants,

MICHAEL KOLE,

Plaintiff,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellant/
Cross-Appellee.

A petition for rehearing having been filed herein by counsel for appellant, Korean Air Lines Co., Ltd.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied and the opinion filed November 3, 1994, is withdrawn, and an amended opinion is hereby filed.

IT IS FURTHER ORDERED that the judgment entered in the District Court for the Southern District of New York on April 12, 1993, and appealed from be, and it hereby is, affirmed in part, vacated in part, and remanded in part to the said District Court for further proceedings in accordance with the opinion of this Court.

GEORGE LANGE III, Clerk

By: [ILLEGIBLE]
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 93-7490, 93-7546

Filed January 20, 1995

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of January, one thousand nine hundred and ninety-five.

Marjorie Zickerman, individually and as executrix under the estate of Muriel A.M.S. Kole; Muriel Mahalek, mother and next of kin of Muriel A.M.S. Kole,

Plaintiffs-Appellees,
Cross-Appellants,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellant/
Cross-Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Korean Air Lines Co., Ltd.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell,
Chief Duty Clerk

Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

49 Stat. 3019.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Article 25(1)

1. The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

* * *

49 Stat. 3020.

Article 28(2)

* * *

2. Questions of procedure shall be governed by the law of the court to which the case is submitted.

49 Stat. 3020.

Article 29(2)

* * *

2. The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

49 Stat. 3021.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States', the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

Supreme Court, U.S.
FILED
MAY 31 1995
OFFICE OF THE CLERK

(4) (4)

Nos. 94-1361, 94-1477

In The

Supreme Court of the United States

October Term, 1994

MARJORIE ZICHERMAN, Individually and as executrix of the estate of Muriel A.M.S. Kole, and MURIEL MAHALEK,

Petitioners/Cross-Respondents,

v.

KOREAN AIR LINES CO., LTD.,

Respondent/Cross-Petitioner.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

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Petition For Certiorari Filed February 9, 1995
Cross-Petition For Certiorari Filed March 6, 1995
Certiorari Granted April 17, 1995

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Note: the November 3, 1994 opinion of the Second Circuit was withdrawn on December 5, 1994, and an amended opinion was filed. The amended opinion is reproduced in the Appendix to the Petition for Writ of Certiorari at A1

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Zicherman, *et al.* v. Korean Air Lines, *et al.*
Assigned to: Judge Constance Baker Motley

CIVIL DOCKET FOR CASE # 83-CV-8428

Docket Date	Item No.	Filings – Proceedings
11/18/83	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE $120.00 RECEIPT # 83709 (gq) [Entry date 03/10/92]
1/4/84	5	ORDER of Multi District Panel transferring this action to District Court of The District of Columbia pursuant to judicial panel under 28 U.S.C. § 1407, with the consent of that Court assigned to Hon. Aubrey E. Robinson, Jr. (gq) [Entry date 03/10/92]
1/6/84	–	Interdistrict transfer to U.S.D.C., District of Columbia; Sent via Certified Mail # P 445 160 558 on 1/6/84. Mailed entire case file together with certified copies of order and docket sheet. (gq) [Entry date 03/10/92]
2/10/92	–	Certified Copy of Conditional Remand Order filed 2/7/92

		from Judicial Panel on Multi-district Litigation remanding case to transferor Court, Southern District of New York, U.S.D.C. (gq) [Entry date 03/10/92]
2/10/92	--	Case reopened (gq) [Entry date 03/10/92]
3/10/92	-	Mailed notice to U.S.D.C., District of Columbia, acknowledging receipt of file. (gq)
5/19/92	9	MEMORANDUM by Korean Air Lines Co., Inc. in response to plaintiff's motion to amend the complaint. (gq)
6/1/92	16	PRETRIAL SCHEDULING ORDER setting Pretrial conference for 10:00 6/25/92 . . . that leave to file amended complaint granted . . . motion to admit W. Paul Needham Pro Hac Vice granted . . . that sealed affidavit is due from Mr. Needham on or before 6/10/92 . . . that additional submissions will be due from all parties and proposed intervenor on or before 6/23/92 . . . SO ORDERED . . . (signed by Judge Constance B. Motley); Copies mailed (gq) [Entry date 6/12/92]
6/24/92	20	PROPOSED AMENDED COMPLAINT by Michael Kole, (Answer due 7/7/92 for Korean Air Lines,) amending

		[1-1] compliant [sic]; Summons issued. (gq)
7/9/92	28	ANSWER by Korean Air Lines, Ltd. (Attorney George N. Tompkins) to amended complaint; Firm of: Condon & Forsyth by attorney George N. Tompkins Jr. for defendant Korean Air Lines, Ltd. (gq)
9/21/92	41	PRE-TRIAL MEMORANDUM by Marjorie Zicherman, Muriel Mahalek, Michael Kole. (gq)
9/23/92	42	NOTICE OF MOTION by Korean Air Lines, Ltd. to strike plaintiffs' jury demand, to determine the law applicable to the determination of damages, to dismiss Muriel Mahalek as a party plaintiff, Return date 9/28/92 (gq)
9/23/92	43	MEMORANDUM OF POINTS AND AUTHORITIES by Korean Air Lines Co., Ltd., in support of [42-1] motion to strike plaintiffs' jury demand, [42-2] motion to determine the law applicable to the determination of damages, [42-3] motion to dismiss Muriel Mahalek as a party plaintiff. (gq)
9/23/92	44	NOTICE OF MOTION by Korean Air Lines Co., Ltd in limine to exclude at trial and at voir dire any reference to and

		evidence of negligence or wilful misconduct on the part of Korean Air Lines Co., Ltd., Return date 9/28/92 (gq)
9/23/92	45	MEMORANDUM OF POINTS AND AUTHORITIES by Korean Air Lines Co., Ltd., in support of [44-1] motion in limine to exclude at trial and at voir dire any reference to and evidence of negligence or wilful misconduct on the part of Korean Air Lines Co., Ltd. (gq)
9/23/92	46	NOTICE OF MOTION by Korean Air Lines Co., Ltd., in limine to dismiss claims for mental pain and suffering and to preclude the expert testimony of Robert L. Elzy and James J. Foody, Return date 9/28/92 (gq)
9/23/92	47	MEMORANDUM OF POINTS AND AUTHORITIES by Korean Air Lines Co., Ltd., in support of [46-1] motion in limine to dismiss claims for mental pain and suffering and to preclude the expert testimony of Robert L. Elzy and James J. Foody. (gq)
10/2/92	48	NOTICE OF MOTION by Korean Air Lines, Ltd., in limine to preclude the expert testimony of Conrad Berenson, Return date 10/2/92 (gq)

10/2/92	49	MEMORANDUM OF POINT AND AUTHORITIES by Korean Air Lines, Ltd., in support of [48-1] motion in limine to preclude the expert testimony of Conrad Berenson. (gq)
10/5/92	50	NOTICE OF MOTION by Marjorie Zicherman, Muriel Mahalek, Michael Kole to exclude testimony of Michael Kole, Return date: Not Indicated. (gq)
10/5/92	51	MEMORANDUM OF POINTS AND AUTHORITIES by Marjorie Zicherman, Muriel Mahalek, Michael Kole in opposition to [46-1] motion in limine to dismiss claims for mental pain and suffering and to preclude the expert testimony of Robert L. Elzy and James J. Foody. (gq)
10/5/92	52	OPPOSITION BRIEF by Marjorie Zicherman, Muriel Mahalek, Michael Kole re [42-1] motion to strike plaintiffs' jury demand, [42-2] motion to determine the law applicable to the determination of damages, [42-3] motion to dismiss Muriel Mahalek as a party plaintiff. (gq)
10/5/92	53	BRIEF by Marjorie Zicherman, Muriel Mahalek, Michael Kole re: On issue of mentioning

		prior jury's finding of wilful misconduct. (gq)
10/5/92	54	Request to charge the jury by Marjorie Zicherman, Muriel Mahalek, Michael Kole. (kg) [Entry date 10/06/92]
10/5/92	55	Request for Jury voir dire by Marjorie Zicherman, Muriel Mahalek, Michael Kole. (kg) [Entry date 10/06/92]
10/8/92	57	REPLY MEMORANDUM OF POINTS AND AUTHORITIES by Korean Air Lines, Ltd., in support of [44-1] motion in limine to exclude at trial and at voir dire any reference and evidence of negligence or wilful misconduct on the part of Korean Air Lines Co., Ltd. (gq)
10/8/92	58	REPLY MEMORANDUM OF POINTS AND AUTHORITIES by Korean Air Lines, Ltd., in support of [42-1] motion to strike plaintiffs' jury demand, [42-2] motion to determine the law applicable to the determination of damages, [42-3] motion to dismiss Muriel Mahalek as a party plaintiff. (gq)
10/8/92	59	REPLY MEMORANDUM OF POINTS AND AUTHORITIES by Korean Air Lines, Ltd. in support of [46-1] motion in limine to dismiss claims for mental

		pain and suffering and to preclude the expert testimony of Robert L. Elzy and James J. Foody. (gq)
10/8/92	60	Proposed voir dire questions by Korean Air Lines Co., Ltd. (gq)
10/8/92	61	Trial Exhibit list by Korean Air Lines Co., Ltd. (gq)
10/8/92	62	Witness list by Korean Air Lines Co., Ltd. (gq)
10/8/92	63	Request to charge jury by Korean Air Lines Co., Ltd. (gq)
10/13/92	64	SUPPLEMENTAL MEMORANDUM ON APPLICABLE MEASURE OF DAMAGES by Marjorie Zicherman, Muriel Mahalek, Michael Kole. (gq)
10/13/92	65	Supplemental Request to charge by Marjorie Zicherman, Muriel Mahalek, Michael Kole. (gq)
10/13/92	66	Proposed voir dire special questions by Marjorie Zicherman, Muriel Mahalek, Michael Kole to the jury. (gq)
10/14/92	67	SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES by Korean Air Lines Co., Ltd. in support of [42-2] motion to determine the law applicable to the determination of damages. (gq)

10/14/92	68	REPLY MEMORANDUM by Marjorie Zicherman, Muriel Mahalek, Michael Kole addressing deft's Supplemental Memorandum of Points and Authority as to [42-2] motion to determine the law applicable to the determination of damages (gq) [Entry date 10/15/92]
10/20/92	69	SUPPLEMENTAL MEMORANDUM by Korean Air Lines, Ltd. in support of [42-2] motion to determine the law applicable to the determination of damages. (gq)
10/29/92	70	MEMORANDUM OPINION ON PRE-TRIAL MOTION # 70622 granting [50-1] motion to exclude testimony of Michael Kole, denying [48-1] motion in limine to preclude the expert testimony of Conrad Berenson, denying [46-1] motion in limine to dismiss claims for mental pain and suffering and to preclude the expert testimony of Robert L. Elzy and James J. Foody, denying [44-1] motion in limine to exclude at trial and at voir dire any reference to and evidence of negligence or wilful misconduct on the part of Korean Air Lines Co., Ltd., denying [42-1] motion to strike plaintiffs' jury demand, denying [42-2] motion

to determine the law applicable to the determination of damages, denying [42-3] motion to dismiss Muriel Mahalek as a party plaintiff, that all of the foregoing claimed losses must be proved at trial. The references to DOHSA do not foreclose pltffs' rights under the Warsaw Convention, and pltffs retain their right to a jury trial. Decedent's mother, Muriel Mahalek, may proceed as a party pltff. Pltffs cannot recover for decedent's loss of the quality or enjoyment of life. Pltffs may recover for decedent's conscious pain and suffering, for loss of support, mental injury and grief as defined by this decision, loss of love, affection and companionship, loss of inheritance, and lost services. The testimony of decedent's husband, Michael Kole, is excluded . . . SO ORDERED . . . (Signed by Judge Constance B. Motley); Copies mailed. (gq) [Entry date 10/30/92]

11/12/92 71 NOTICE OF MOTION by Korean Air Lines Co., Inc. to amend the Court's Opinion and Order on Pre-Trial Motions dated 10/29/92 to include a Statement pursuant to 28 U.S.C. paragraph 1292(b) for an

		immediate appeal, Return date 11/30/92 (gq)
11/12/92	72	MEMORANDUM OF POINTS AND AUTHORITIES by Korean Air Lines, Ltd. in support of [71-1] motion to amend the Court's Opinion and Order on Pre-Trial Motions dated 10/29/92 to include a Statement pursuant to 28 U.S.C. paragraph 1292(b) for an immediate appeal. (gq)
11/12/92	73	OPPOSITION TO MOTION by Marjorie Zicherman, et al., re: for statement permitting an immediate appeal. (kg)
11/20/92	74	OPINION #70708 denying [71-1] motion to amend the Court's Opinion and Order on Pre-Trial Motions dated 10/29/92 to include a Statement pursuant to 28 U.S.C. paragraph 1292(b) for an immediate appeal; neither will 1292(b) certification be granted as to this court's 11/19/92 Amended Opinion on Pre-Trial Motions. (Signed by Constance B. Motley); Copies mailed. (kg)
11/20/92	75	AMENDED OPINION ON PRE-TRIAL MOTIONS #70622, that all of the foregoing claimed losses must be proved at trial. The references to DOHSA do not foreclose pltffs'

		rights under the Warsaw Convention, and pltffs retain their right to a jury trial. Decedent's mother, Muriel Mahalek, may proceed as a party pltff. Pltffs cannot recover for decedent's loss of the quality or enjoyment of life. Pltffs may recover for decedent's conscious pain and suffering, for loss of support, mental injury and grief as defined by this decision, loss of love, affection and companionship, loss of inheritance, and lost services. The testimony of decedent's husband, Michael Kole, is excluded. (Signed by Judge Constance B. Motley); Copies mailed. (kg)
11/24/92	77	REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT by Korean Air Lines, re: [71-1] motion to amend the Court's Opinion and Order on Pre-Trial Motions dated 10/29/92 to include a Statement pursuant to 28 U.S.C. paragraph 1292(b) for an immediate appeal. (kg)
12/8/92	78	Witness list by Korean Air Lines Co., Ltd. (gb)
12/8/92	79	Filed Korean Air Lines Co., Ltd's trial exhibit list. (gb)
12/14/92	–	Memorandum to Docket Clerk: Jury Trial begin & continued

		12/7/92-12/10/92. Trial concluded 12/11/92. Total trial days: 5 days. Jury Verdict See attached jury verdict sheet. Submitted by Gloria Katz (kg) [Entry date 12/16/92]
12/17/92	80	Proposed Special Interrogatories to the Jury filed by Korean Air Lines Co., Ltd. (kg) [Entry date 12/18/92]
12/17/92	81	NOTICE of Filing the attached Proposed Special Verdict Form with the court in order to complete the record in the above captioned matter by Korean Air Lines Co., Ltd. (kg) [Entry date 12/18/92]
12/18/92	82	BRIEF ON PRE-JUDGMENT INTEREST by Marjorie Zicherman, Muriel Mahalek, Michael Kole. (kg)
12/18/92	83	MEMORANDUM OF LAW by Korean Air Lines, re: regarding pre-judgment interest. (kg)
1/6/93	84	Transcript of record of proceedings filed for dates of 10/2/92 at 11:55 a.m. (kg)
1/6/93	85	Transcript of record of Proceedings filed for dates of 10/5/92 at 12:00 a.m. (kg)
1/26/93	86	MEMORANDUM OPINION #70977, pltff's are entitled to prejudgment interest on damages remedying both their

		pecuniary and non-pecuniary losses. Pre-Judgment interest will be calculated according to the formula at the average prime interest rate from the date of the accident to the date of judgment. (Signed by Judge Constance B. Motley); Copies mailed. (gb) [Entry date 01/27/93]
4/12/93	–	Case closed (gb) [Entry date 04/13/93]
4/12/93	87	MEMORANDUM OPINION #71338, both pltff and deft. agreed on the calculations of the discounted awards . . . pltff's submitted a proposed judgment with interest compounded annually., deft. submitted a proposed judgment based on the average yearly prime interest rate for each year from the date of the accident to the present. The court accepts the discounted rates submitted by the parties and defts calculation of simple interest based on average yearly prime rate from the date of the accident to the date of judgment . . . interest is added to determine the total award . . . (Signed by Judge Constance B. Motley); Copies mailed. (gb) [Entry date 04/13/93]

4/22/93	88	NOTICE OF MOTION by Michael Kole, Marjorie Zicherman, Muriel Mahalek to amend the final judgment, dated 4/12/93, Return date 4/30/93 (sc)
4/22/93	89	MEMORANDUM by Michael Kole, Marjorie Zicherman, Muriel Mahalek in support of [88-1] motion to amend the final judgment, dated 4/12/93 (sc)
4/22/93	90	NOTICE OF MOTION by Korean Air Lines Co., Ltd. for an Order granting KAL Judgment as a Matter of Law. (ND: 4/22/93 at 8:01P) (kg) [Entry date 04/26/93]
4/22/93	91	MEMORANDUM OF POINTS AND AUTHORITIES by Korean Air Lines Co., Ltd. in support of [90-1] motion for an Order granting KAL Judgment as a Matter of Law. (kg) [Entry date 04/26/93]
4/30/93	92	MEMORANDUM by Korean Air Lines, in opposition to [88-1] motion to amend the final judgment, dated 4/12/93 (gb)
5/4/93	93	OPPOSITION by Marjorie Zicherman, Michael Kole, Muriel Mahalek re: [88-1] motion to amend the final judgment dtd. 4/12/93. (kg)
5/6/93	94	MEMORANDUM OPINION #71460 denying [88-1] motion

		to amend the final judgment dtd. 4/12/93, denying [90-1] motion for an Order granting KAL Judgment as a Matter of Law. (Signed by Judge Constance B. Motley); Copies mailed. (gb) [Entry date 05/07/93]
5/20/93	95	NOTICE OF APPEAL by Korean Air Lines; from [94-1] order and judgment entered 4/13/93. Copies of notice of appeal mailed to Attorney(s) of Record: W. Paul Needham, Christopher Lovell. (jf) [Entry date 05/25/93]
5/25/93	–	Notice of appeal and certified copy of docket to USCA: [95-1] appeal by Korean Air Lines; Copy of notice of appeal sent to District Judge. (jf)
5/28/93	96	Transcript of record of proceedings filed for dates of December 7, 8, 9, 10, 1992 (kk)
6/3/93	97	NOTICE OF [CROSS-] APPEAL by Marjorie Zicherman from the May 7, 1993 denial of their motion to amend judgment. Copies sent to: George Tompkins, Jr., Esq. (jf) [Entry date 06/04/93]
6/4/93	–	Notice of appeal and certified copy of docket to USCA: Copy of notice of appeal sent to District Judge. (jf)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Zicherman, *et al.* v. Korean Air Lines, *et al.*, No. 93-7490

5/20/93	NOTE: See related case: 92-7722 (col) [93-7490]
5/21/93	Copy of district court docket entries and notice of appeal on behalf of Appellant Korean Air Lines, In filed. [93-7490] Form C due on 6/1/93. Form D due on 6/1/93. (col) [93-7490]
5/21/93	Copy of receipt re: payment of docketing fee filed on behalf of Appellant Korean Air Lines, In receipt #:192537. [93-7490] (col) [93-7490]
5/26/93	Appellant Korean Air Lines, In Form C filed, with proof of service; also includes Papers titled "Paragraph 3 (e) Filing" with Exhibits A-G. [93-7490] Form C deadline satisfied. (col) [93-7490]
5/26/93	Appellant Korean Air Lines, In Form D filed, with proof of service. [93-7490] Form D deadline satisfied. (col) [93-7490]
6/3/93	Copy of district court docket entries and notice of appeal on behalf of Appellee-Cross-Appellant Marjorie Zicherman in 93-7546 filed. [93-7546] Form C due on 6/14/93. Form D due on 6/14/93. (col) [93-7546]
6/9/93	Copy of receipt re: payment of docketing fee filed on behalf of Appellee-Cross-Appellant Muriel Mahalek in 93-7546, Appellee-Cross-Appellant Marjorie Zicherman in 93-7546 receipt #: 193628. [93-7546] (cv72) [93-7546]

6/15/93 Copy of Court Reporter Acknowledgment received. (col) [93-7490 93-7546]

6/23/93 Order dismissing the appeal for failure to file Forms C and D pursuant to CAMP filed. (col) [93-7546]

6/23/93 Certified copy of order dated 6/23/93 disposing of the appeal issued to district court. (col) [93-7546]

6/30/93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross Appellant Muriel Mahalek in 93-7546 motion to reinstate appeal FILED (w/pfs). [410286-1] To SB (com) [93-7546]

6/30/93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross Appellant Muriel Mahalek in 93-7546 Form C RECEIVED, with proof of service. [93-7546] (com) [93-7546]

6/30/93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross Appellant Muriel Mahalek in 93-7546 Form D RECEIVED, with proof of service. [93-7546] (com) [93-7546]

7/1/93 Order FILED GRANTING motion to reinstate appeal [410286-1] by Appellee-Cross-ApMarjorie Zicherman, Muriel Mahalek, endorsed on motion form dated 6/30/93. By S.B. (com) [93-7546]

7/1//93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross-Appellant Muriel Mahalek in 93-7546 Form C Filed, with proof of service. [93-7546] (com) [93-7546]

7/1/93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross-Appellant Muriel Mahalek in 93-7546 Form D Filed, with proof of service. [93-7546] (com)[93-7546]

7/1/93 Scheduling order #1 filed. Record on appeal due on 7/23/93. Appellant's brief and appendix due on 7/30/93. Appellee's brief due on 8/30/93, Reply brief of Appellants-cross-Appellees due on 9/13/93. Argument as early as week of 10/4/93. (Pre-Argument Conference scheduled for 7/15/93 3:00pm). (com) [93-7490]

7/26/93 Notice of appearance form on behalf of Paul W. Needham, Esq., [sic] received. (Orig. to Calendar) (cma) [93-7490]

7/29/93 Record on appeal index in lieu of record filed. (Docs 1 - 64 listed on the index) (twn) [93-7490]

7/29/93 New scheduling order number #2 filed. New appellant's brief due date is 8/6/93. New appellee's brief due date is 9/7/93, New appellant's reply brief due date is 7/21/93. New argument week as early as 10/12/93. (SAB) (twr) [93-7490]

8/6/93 Appellant-Cross-Appellee Korean Air Lines, In in 93-7490 brief FILED with proof of service. (twg) [93-7490]

8/6/93 Appellant-Cross-Appellee Korean Air Lines, In in 93-7490 joint appendix filed w/pfs. Number of volumes: 3. (twg) [93-7490]

8/11/93	Notice of appearance form on behalf of Andrew J. Harakas, Esq., received. (Orig. to Calendar) (cma) [93-7490]
8/12/93	The CAPTION PAGE for this appeal has been AMENDED per letter dated August 6, 1993. (unv) [93-7490 93-7546]
9/1/93	Appellee-Cross-Appellant Marjorie Zicherman in 93-7490, Appellee-Cross-Appellant Muriel Mahalek in 93-7490 brief filed with proof of service. (rsk) [93-7490]
9/9/93	Proposed for argument the week of 10/25/93. (cac) [93-7490]
9/16/93	Set for argument on 10/28/93. [93-7490] (car) [93-7490]
9/21/93	Appellant-Cross-Appellee Korean Airlines, Co. in 93-7490 reply brief filed with proof of service. (to cal.). Satisfy appellant's reply brief due. (twn) [93-7490]
10/28/93	Case heard before Winter, Lumbard, Van-Graafeiland (TAPE: 54 & 55) (cag)
4/20/94	Record on appeal after index filed. 2 vols. (Doc# 1-63) (twr) [93-7490]
7/19/94	Letter from Appellant's counsel regarding change of attorney received (ond) [93-7490]
9/19/94	Appellee-Cross-Appellant Muriel Mahalek in 93-7490, Appellee-Cross-Appellant Marjorie Zicherman in 93-7490 28(J) letter received. (cv75) [93-7490]
11/3/94	Judgment of the district court is AFFIRMED in part, VACATED in part, and REMANDED in part by published signed opinion filed. (JEL) (cv75) [93-7546]

11/3/94	Judgment of the district court is AFFIRMED in part, VACATED in part, and REMANDED in part by published signed opinion filed. (JEL) (cv75) [93-7490]
11/3/94	Judgment filed. (cv70) [97-7490]
11/3/94	Judgment filed. (cv70) [97-7546]
11/10/94	Appellees-Cross-Appellants Muriel Mahalek, Marjorie Zicherman in 93-7490 Motion to Stay Issuance of mandate FILED (w/pfs). [582824-1] (cv75) [93-7490]
11/10/94	Appellees-Cross-Appellants Muriel Mahalek, Marjorie Zicherman motion to stay the mandate, FILED (w/pfs). [582824-1] (cv70) [93-7546]
11/13/94	Appellant-Cross-Appellee Korean Airlines, Co. in 93-7490 itemized and verified bill of costs received. (cv71) [93-7490]
11/17/94	Appellant-Cross-Appellee Korean Airlines, Co. in 93-7490 motion for costs FILED (w/ pfs). [585194-1] (cv71) [93-7490]
11/17/94	Appellant-Cross-appellee Korean Airlines, Co. in 93-7490 Petition for rehearing, and petition for rehearing in banc [585240-2] with proof of service filed. (cv71) [93-7490]
11/23/94	Appellees-Cross-Appellants Muriel Mahalek in 93-7490, Marjorie Zicherman in 93-7490 Verified Opposition to Appellant's Motion for costs with proof of service filed. (cv75) [93-7490]
11/30/94	Order FILED GRANTING motion to stay issuance of mandate pending application for writ of cert. from Supreme Court [582824-1] [endorsed on motion form dated

11/10/94] [By: JEL, EAVG, RKW, Cjj] (cv70) [93-7490]

11/30/94 Order FILED GRANTING motion to stay issuance of mandate pending application for writ of cert. from Supreme Court [589121-1] [endorsed on motion form dated 11/10/94] [By: JEL, EAVG, RKW, Cjj] (cv70) [93-7546]

11/30/94 Certified copy of the order dated 11.30.94 staying issuance of the mandate issued to the district court SDNY. (cv70) [93-7490]

12/5/94 Upon consideration of the petition, the opinion filed November 3, 1994, is withdrawn, and an amended opinion is filed. The petition for rehearing is denied. Judgment of the district court is AFFIRMED IN PART, VACATED IN PART, AND REMANDED IN PART, Amended published signed opinion filed (JEL). (cv75) [93-7490]

12/5/94 Upon consideration of the petition, the opinion filed November 3, 1994, is withdrawn, and an amended opinion is filed. The petition for rehearing is denied. Judgment of the district court is AFFIRMED IN PART, VACATED IN PART, AND REMANDED IN PART, Amended published signed opinion filed (JEL). (cv75) [93-7546]

12/5/94 Order FILED GRANTING, to the extent of dividing the cost of preparing the Joint Appendix between the parties. motion for cost [585194-1] by Appellant-Cross-Appellee Korean Airlines, Co., endorsed on

motion form dated 11/17/94, Before: JEL, EVG, RKW. (per CCC) (cv75) [93-7490]

12/5/94 Order stating that a petition for rehearing having been filed herein by counsel for appellant KOREAN AIR LINES CO LTD; upon consideration, it is ORDERED that said petition is DENIED and the opinion filed 11.3.94 is withdrawn and an amended opinion is hereby filed. FURTHER ORDERED that the judgment entered in the district court for the Southern Dist. of NY on 4.12.93 and appealed from is AFFIRMED IN PART, VACATED IN PART, and REMANDED IN PART to the said district court for further proceedings in accordance with the opinion of this Court, FILED [Before: JEL,EAVG,RKW/By:JM] (cv70) [93-7490]

12/5/94 Judgment filed. (cv70) [93-7490]

12/5/94 Judgment filed. (cv70) [93-7546]

12/6/94 ORDER stating that the pending suggestion for rehearing in banc is DISMISSED WITHOUT PREJUDICE to the filing of a subsequent petition for rehearing and a subsequent suggestion for rehearing in banc, addressed to the amended opinion; any subsequent petition for rehearing and suggestion for rehearing in banc must be filed within 14 days of the filing of the amended opinion; a party that has previously filed a suggestion for rehearing in banc may notify the clerk by letter that its previously filed suggestion for rehearing in banc should be recirculated to the Court,

	without the need for filing a revised suggestion for rehearing in banc, FILED. [By: GLIII] (cv70) [93-7490]
12/20/94	Correspondence of George N. Tompkins, Jr. dated 12/16/94, request that its previously filed suggestion for rehearing in banc be recirculated to the Court with respect to Point I and Point III only. (cv75) [93-7490]
1/20/95	ORDER stating that a petition for rehearing containing a suggestion that the action be reheard in banc having been filed by appellant Korean Air Lines Co Ltd, upon consideration the petition for rehearing is DENIED. Further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court and no such judge has requested that a vote be taken thereon, FILED. [By: CCC] (cv70) [93-7490]
1/27/95	Judgment MANDATE ISSUED. (cv70) [93-7490]
1/27/95	Judgment MANDATE ISSUED. (cv70) [93-7546]
2/2/95	Correspondence of Kevin M. Hensley, Esq., dated 2.1.95, re: his request for recall of the mandate in light of this court's order dated 11.30.94 staying the mandate pending application to the Supreme Court for a pet. for cert., RECEIVED. (cv70) [93-7490]
2/7/95	Letter sent to district court recalling mandate in light of USCA order dated 11.30.94 staying issuance pending application for cert.. [re:93-7490]. (cv70) [93-7490]
2/7/95	Letter sent to district court recalling mandate in light of USCA order dated 11.30.94

staying issuance pending application for cert.. [re:93-7490]. (cv70) [93-7546]

2/21/95 Notice of filing petition for writ of certiorari for Appellee-Cross-Appellants Zicherman dated 2.9.95 filed Supreme Ct#: 94-1361. (cv70) [93-7490]

3/10/95 Notice of filing petition for writ of certiorari for Appellant-Cross-Appellee Korean Airlines, Co. dated 3.6.95 filed. Supreme Ct#: 94-1477. (cv70) [93-7490]

4/19/95 Certified copy of Supreme Court order GRANTING petition for writ of certiorari [631999-1] by Appellee-Cross-ApMuriel Mahalek, Marjorie Zicherman, endorsed on motion form dated 2/21/95. dated 4.17.95. (cv72) [93-7490]

4/19/95 Certified copy of Supreme Court order GRANTING petition for writ of certiorari [632000-1] by Appellant-Cross-AKorean Airlines, Co., endorsed on motion form dated 3/10/95. dated 4.17.95. (cv72) [93-7490]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Zicherman, *et al.* v. Korean Air Lines Co. Ltd., No. 93-7546

6/3/93 Copy of district court docket entries and notice of appeal on behalf of Appellee-Cross-Appellant Marjorie Zicherman in 93-7546 filed. [93-7546] Form C due on 6/14/93. Form D due on 6/14/93. (col) [93-7546]

6/9/93 Copy of receipt re: payment of docketing fee filed on behalf of Appellee-Cross-Appellant Muriel Mahalek in 93-7546, Appellee-Cross-Appellant Marjorie Zicherman in 93-7546 receipt #: 193628. [93-7546] (cv72) [93-7546]

6/15/93 Copy of Court Reporter Acknowledgment filed. (col) [93-7546]

6/15/93 Copy of Court Reporter Acknowledgment received. (col) [93-7490 93-7546]

6/23/93 Order dismissing the appeal for failure to file Forms C and D pursuant to CAMP filed. (col) [93-7546]

6/23/93 Certified copy of order dated 6/23/93 disposing of the appeal issued to district court. (col) [93-7546]

6/30/93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross-Appellant Muriel Mahalek in 93-7546 motion to reinstate appeal FILED (w/pfs). [410286-1] to SB (com) [93-7546]

6/30/93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross-Appellant Muriel Mahalek in 93-7546 Form C

RECEIVED, with proof of service. [93-7546] (com) [93-7546]

6/30/93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross-Appellant Muriel Mahalek in 93-7546 Form D RECEIVED, with proof of service. [93-7546] (com) [93-7546]

7/1/93 Order FILED GRANTING motion to reinstate appeal [410286-1] by Appellee-Cross-ApMarjorie Zicherman, Muriel Mahalek, endorsed on motion form dated 6/30/93. By S.B. (com) [93-7546]

7/1/93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross-Appellant Muriel Mahalek in 93-7546 Form C filed, with proof of service. [93-7546] (com) [93-7546]

7/1/93 Appellee-Cross-Appellant Marjorie Zicherman in 93-7546, Appellee-Cross-Appellant Muriel Mahalek in 93-7546 Form D filed, with proof of service. [93-7546] (com) [93-7546]

7/1/93 FOR A LIST OF COMPLETE DOCKET ENTRIES PLEASE SEE THE LEAD APPEAL, DOCKET NUMBER Lead Number: 93-7490. (com) [93-7546]

8/12/93 The CAPTION PAGE for this appeal has been AMENDED per letter dated August 6, 1993. (unv) [93-7490 93-7546]

9/21/93 For judicial statistical purposes, the last brief filed on this consolidated or cross-appeal was recorded on the LEAD appeal on 9.21.93. (und) [93-7546]

10/28/93	Case heard before Winter, Lumbard, Van-Graafeiland on tape #54 & 55) (cag) [93-7546]
11/3/94	Judgment of the district court is AFFIRMED in part, VACATED in part, and REMANDED in part by published signed opinion filed. (JEL) (cv75) [93-7546]
11/3/94	Judgment filed. (cv70) [93-7546]
11/10/94	Appellees-Cross-Appellants Muriel Mahalek and Marjorie Zicherman motion to stay the mandate, FILED (w/pfs). [589121-1] (cv70) [93-7546]
11/30/94	Order FILED GRANTING motion to stay issuance of mandate pending application for writ of cert. from Supreme Court [589121-1] [endorsed on motion form dated 11/10/94] [By: JEL, EAVG, RKW, Cjj] (cv70) [93-7546]
12/5/94	Upon consideration of the petition, the opinion filed November 3, 1994, is withdrawn, and an amended opinion is filed. The Petition for rehearing is denied. Judgment of the district court is AFFIRMED IN PART, VACATED IN PART, AND REMANDED IN PART, Amended published signed opinion filed. (JEL). (cv 75) [93-7546]
12/5/94	Judgment filed. (cv70) [93-7546]
1/27/95	Judgment MANDATE ISSUED. (cv70) [93-7546]
2/7/95	Letter sent to district court recalling mandate in light of USCA order dated 11.30.94 staying issuance pending application for cert.. [re: 93-7546]. (cv70) [93-7546]

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

MARJORIE ZICHERMAN, individually and as Executrix of the Estate of Muriel A.M.S. Kole, and MURIEL MAHALEK, Plaintiffs	)	CIVIL ACTION NO. 1983-8428 (Motley, J.)
v.	)	
KOREAN AIRLINES, INC., Defendant	)	

AMENDED COMPLAINT AND
JURY DEMAND

PARTIES

1. The plaintiff Marjorie Zicherman ("Zicherman") is the sister of the decedent Muriel A.M.S. Kole, and is a resident of Massachusetts. She is the duly appointed Executrix of the decedent's estate.

2. The plaintiff Muriel Mahalek ("Mahalek") is the decedent's mother, and is a resident of New York.

3. The defendant Korean Airlines Inc. ("KAL") is a South Korean corporation authorized to conduct business in New York.

JURISDICTION

4. This court has jurisdiction under 28 U.S.C. §1332 because of the complete diversity of citizenship of the parties, and because the amount in controversey [sic]

exceeds $50,000.00; under the Warsaw Convention, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. §1502; and under the Death on the High Seas Act, 41 Stat. 537, *reprinted at* 46 U.S.C. App. §761 *et seq.*

COUNT I
(WARSAW CONVENTION)

5. On or about September 1, 1983, KAL Flight 007 was shot down by a Soviet jet fighter.

6. Flight 007 had been en route from New York City to Seoul, Korea.

7. Flight 007 crashed into the Sea of Japan beyond one marine league from the shore of the United States or its territories or dependencies.

8. The decedent, Muriel A.M.S. Kole, was killed in the crash of Flight 007.

9. The decedent's death was caused by the willful misconduct of KAL.

10. KAL is liable to the plaintiffs under the Warsaw Convention for all damages they sustained as a result of the decedent's death.

WHEREFORE, the plaintiffs demand judgment against KAL for their pecuniary damages, for their grief and mental anguish, for the loss of the decedent's society and companionship, and for the decedent's conscious pain and suffering prior to her death, in the amount of $5,000,000.00 (five million dollars) plus interest and costs.

COUNT II
(DEATH ON THE HIGH SEAS ACT)

11. The plaintiffs incorporate by reference the allegations made in paragraphs 1-10 of this amended complaint.

12. KAL is liable to the plaintiffs under the Death on the High Seas Act, 46 U.S.C. App. §761 *et seq.*, for all damages they sustained as a result of the decedent's death.

13. KAL is liable to the plaintiffs under Korean law, applicable to this case pursuant to 46 U.S.C. App. §764, for the plaintiffs' mental anguish and loss of the decedent's society and companionship.

WHEREFORE, the plaintiffs demand judgment against KAL for their pecuniary damages, for their grief and mental anguish, for the loss of the decedent's society and companionship, and for the decedent's conscious pain and suffering prior to her death, in the amount of $5,000,000.00 (five million dollars) plus interest and costs.

COUNT III
(CONSCIOUS PAIN AND SUFFERING)

14. The plaintiffs incorporate by reference the allegations made in paragraphs 1-13 of this amended complaint.

15. The decedent suffered conscious terror and pain after Flight 007 was first hit by missles [sic] from a Soviet interceptor, and before her death.

WHEREFORE, the plaintiff Marjorie Zicherman, as Executrix of the Estate of Muriel A.M.S. Kole, requests judgment against KAL in the amount of $5,000,000.00 (five million dollars), plus interest and costs.

JURY CLAIM

The plaintiffs claim a trial by jury on all counts.

Marjorie Zicherman,
individually as [sic] as
Executrix of the
Estate of Muriel
A.M.S. Kole, and
Muriel Mahalek.
By their attorney,

/s/ W. Paul Needham

W. Paul Needham
WN3518
Needham & Warren
4 Liberty Square
Boston, MA 02109
(617) 482-0500

Admitted *pro hac vice*
to the U.S. District
Court for the Southern
District of New York

DATED:

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TESTIMONY OF MARJORIE ZICHERMAN

* * *

[p. 227] DIRECT EXAMINATION

BY MR. NEEDHAM:

Q. Marjorie, Muriel Kole was your sister, wasn't she?

A. Yes. Yes, she was.

Q. How much older than you was Muriel?

A. Six years older.

Q. Where with [sic] you born and brought up?

A. We – I was – we were all born – my family was born in Brooklyn, the Canarsie section of Brooklyn.

Q. That is where you grew up with your sister?

A. That's correct.

Q. Where do you live now?

A. I live in Swampscott, a town outside of Boston.

Q. Your married name is Zicherman?

A. That's correct.

Q. Your maiden name was Mahalek, the same as your mother and the same as your sister?

A. Yes.

Q. Could you tell me a little bit about your sister, Muriel, and her career going through school, and if you

[p. 228] could sort of relate it to where she was in school and where you were in school, that might be helpful.

A. Well, in grade school I was at P.S. 242 which is the school she went to when she started. That is a grammar school. While I was in P.S. 242 she was at P.S. 114, the higher elementary school, and then I went to junior high school 211, and when – at that time she went to Prospect Heights High School in Brooklyn, New York, and when I graduated junior high school 211, I followed, went to that particular – same high school which is Prospect Heights High School in Brooklyn, New York.

Q. Where did your sister go after Prospect Heights High School?

A. She received a New York State Regent's scholarship in nursing and went to Brooklyn Hospital, a three year diploma program which she won that scholarship to attend, full scholarship.

Q. After that did she go on to any further studies in the area of nursing, public health?

A. Yes. When she graduated Brooklyn Hospital, she was working even when she was a student nurse at Brooklyn Hospital.

After she graduated from Brooklyn Hospital she worked in Flushing Hospital in the intensive care unit. That was around 1963 to 1964.

[p. 229] In 1965 she worked at the World's Fair, the New York State pavillion in the emergency service.

Q. Where were you in school at that time?

A. I was, when I graduated – I was in high school, and then I, while she was in – after she graduated I went to – she had already graduated, gotten her diploma in nursing, I went to New York City Community College. It was a two-year R.N. degree program. That is from 1965 to 1967.

Q. Did you have a chance during any of the period of time when you were in school to visit your sister at any of her jobs?

A. Well, we, when she decided to become a nurse, I decided to become a nurse and she decided to become a nurse when she was 11 years old, I was 5, so I started – I was really preparing myself to follow in her footsteps since I was 5 years old.

She – when she went to nursing school and she – it came to fruition that she attended Brooklyn Hospital, I had already started taking specific courses in science and biology and excelled in those fields and she would help me in those studies in those fields, she would give me her textbooks, smaller ones, obviously, but I was very interested to follow in her footsteps.

Q. As she continued on, could you continue on with the chronology of what Muriel was doing from 1966, 1967 on [p. 230] and just sort of hit the highlights of the different jobs and positions that she had?

A. After the New York – the New York World's Fair she – she married in '63. She moved to Albany and she had a manpower training scholarship and became an instructor of nursing.

After that she went to the Capital District Psychiatric Center at which time I already had graduated and became an R.N. and due to her intensive care training and her interest in it and how exciting it sounded to me, I entered into the emergency room at Brookdale Hospital and started – I worked there for three years.

Then while she was going into the department of psychiatry in the Capital District Psychiatric Center and said how exciting that was and we were constantly talking about it and I would go up to Albany and she would come to Brooklyn and visit me, she took a lot of interest and met with my instructors, I decided – I followed through and I entered into the field of psychiatry also. I became a psychiatric nurse.

Q. All right.

During the period of time that she was at the Capital District Psychiatric Center, did you have any opportunities to visit with her there?

A. Oh, yes, many times.

[p. 231] Q. What sorts of things did she do there?

A. She was developing new units. She felt that to make an impact, I guess, in the world, you needed to do different exciting things that were innovative to make some positive changes and that there was a lot of room for positive change in the field of psychiatry.

She would show me the units, introduce me to the staff, her friends, her colleagues, and it really was an up and coming field in 19 – at that point it was – in the early '70s, very exciting.

Much of her knowledge I utilized when I came to the Boston area. I became a clinical coordinator of psychiatry and opened up a brand new unit and utilized many of the ideas that my sister utilized just prior to that in opening up the new units at the Capital District Psychiatric Center in outreach and family therapy.

There was all new and innovative techniques that we utilized in the nursing profession.

Q. Did your sister have any training in family therapy?

A. Yes. She took a post-graduate course following her – she received her degree, Bachelor's degree, in nursing, and following that she received a – she went at night, this was all at night, she received a one-year post-graduate certificate in family therapy from the Albany [p. 232] medical center. It was a post-graduate training course.

Q. After the Capital District Psychiatric Center, where did Muriel go from there?

A. She went to the New York State Health and Occupational Services Division. It was a special division in which she utilized the nursing training as well as some of her innovative techniques in family therapy and outreach.

Q. At that time did she have a Master's degree?

A. She received her Master's degree from Russell Sage, it was 1977 that she received that degree.

Q. What was that degree in?

A. It was a Master's degree in health sciences. It would broaden her. She didn't want to stay only in nursing. She needed to broaden the field – her field of expertise and that way she could expand in different roles and then wouldn't be held into one position; could expand upon it and utilize some of her innovative techniques.

Q. Did you have a chance to visit her at all with her job at the New York State Department of Education?

A. Yes. She invited me. There I met her colleagues. I felt like I was part of the staff in some ways.

Q. What sorts of things was she doing on a day-to-day basis?

A. She had developed new audio visual material, [p. 233] materials for training programs. There were –

Q. Just what she did on day-to-day basis?

A. Day to day? She had staff development. She would organize the meetings, the criteria for specific training of employees, new employees, as well as employees of other institutions would invite her in and she would lecture and present herself in terms of lending her expertise to, and staff development, to the heads of each department in other institutions.

Q. For how long was she in that position?

A. Approximately five years, I believe.

Q. What did she do after that?

A. She entered into a smaller division within the larger division which was the civil rights division. It was a small group of individuals, and what she would do was

look into the – those programs that were funded, federally funded, were mandated to hire specifically minorities, handicapped people, a broad range of people that would not have been hired had it not been for her actually going into these areas and seeing that it was expanded upon and that these people could be hired.

Q. That was what year did she go into the civil rights division, do you know?

A. I believe it was 19 – it could have been '79.

Q. At some time after she had been there for a [p. 234] while, did she, was she involved in a car accident?

A. Yes.

Q. Do you know when that was?

A. Yes; February 1, 1981.

Q. Do you know what happened?

A. She was – was going from, I think, Utica to Syracuse in a state car. It didn't have a radio in it and she was not aware of the icey [sic] conditions on the road.

Apparently, many cars had gone off the road. She was not aware of that but her car veered off on a patch of ice, it hit a steel pole and she, the car and her ended up in a ravine. The state police had to remove her with the Jaws of Life to get her out of that vehicle.

Q. What problems did she have as the aftermath of that accident?

A. Numerous problems; neck, head, back. She injured her hand, her left hip was bruised very badly, and

she was hospitalized for a short period of time, was on crutches as soon as she could.

Q. Was she on crutches for an extended period of time?

A. A few months; maybe seven months or so. I don't know exactly.

Q. After the crutches, did she have any other sort of assistance when she walked?

[p. 235] A. She really was determined to get off the crutches even though she wasn't quite ready. She was determined to get better right away and was going back to work.

I think she went into work with crutches. She then went from crutches to a cane, but I thought she was doing it too fast, but she insisted that she use a cane, and she did, but it was – she was in a lot of pain.

Q. At some point did she go out, leave from that job at the New York State Department of Education because of this disability?

A. She finally did leave. The exact date, I couldn't tell you. I know that she was not going in for a period of time, and about a year or so, and then she was terminated by the state.

Q. During that period of time did you ever have an opportunity to see her, meet with her, talk with her?

A. I saw her all the time. She came to Boston. I would go to Albany.

Q. When were you married?

A. I was married in – August 19, 1978.

Q. Was your sister at the wedding?

A. Oh, yes.

Q. Did she help you out in any way with any of the wedding arrangements?

A. Well, my husband couldn't afford a wedding band [p. 236] so I went out and I bought a wedding band for myself. When I told her over the phone that I had done that, she said – she didn't say anything, but when she came to the wedding, I had the wedding band out and I gave it to my husband to put it in his pocket and she gave him a ring to give to me for my wedding. She gave me my wedding band; not my wedding band; my wedding ring.

Q. He didn't mind that?

A. No. He kind of liked that, I think. He was – no, he didn't mind it; he didn't mind it at all.

Q. Did she give you any other help or support when you were first married?

A. Yes. She also gave me a check for $2,000 to pay for the total reception; everything, flowers, everything, everything, the clergy, it was completely paid for, and she also brought a gift of a large beautiful spinning wheel, just a beautiful – I still have it. It is a beautiful gift. She paid for the whole – the wedding, she made the wedding.

Q. Anything else she did for you and your husband?

A. Well, she kept saying, why don't you buy a house, and I said I can't buy a house yet, I am not ready to buy a house.

She said, why don't you start looking around and she called a couple of brokers in the Boston area and she [p. 237] said, let's go look at houses, so we did. We went out and looked at houses and she saw a couple of houses and she didn't like them and whatever.

Then there was one house that was very nice and she said to me, if you would like, you can buy this house. I said I don't have that kind of money to buy a house right now. She said, I will give you the down payment for the house. It is a very good time. It was 1978 and she was actually right. The market was all right.

Q. What was your husband doing then; what was he doing?

A. Well, he had just stared a practice.

Q. What kind of a practice?

A. He is a pediatric, children's dentistry. We came up to the area, and he was struggling, he was drawing very, very little money at the time and it would have been, it was up to me really to support us both until he could draw a little more money, but that took quite a few years. It took about three years.

Q. Eventually he did get things going?

A. Around 1983, late 1983, yes, he did.

Q. During this period of time – may I approach the witness, your Honor?

THE COURT: Yes.

MR. TOMPKINS: Sidebar, your Honor?

[p. 238] THE COURT: Yes.

* * *

[p. 243] MR. NEEDHAM: May I approach the witness, your Honor?

THE COURT: Yes.

Q. Mrs. Zicherman, I want to show you a couple of black and white photographs that were marked as Plaintiffs' Exhibits Number 20 and 21, and ask if you could look at those photographs and show them to the jury and indicate who is identified in the picture.

THE COURT: Refer to the number on the back.

THE WITNESS: Yes.

Q. 21.

A. It says Exhibit Number 21. The blonde woman standing there is my sister as a student nurse at Brooklyn Hospital.

THE COURT: We can pass it later.

Q. The next exhibit is Exhibit Number 20. If you could indicate to the jury what that is as well?

A. Yes. This is also at Brooklyn Hospital in New York City and here she is, I believe they are demonstrating interviewing skills, and she is sitting right over here on the left, or the right.

Q. Exhibit Number 26, could you indicate for the jury what is depicted in Exhibit 26?

A. This is, I believe this is 1977 or 1978 in which [p. 244] she took me to a conference and I am sitting over in the center. This is in Albany and she is – it is kind of an informal discussion and she was taking me around and meeting her colleagues.

Q. Exhibit 23, if you could indicate to the jury who is in that picture and where and when it was taken?

A. This is, I believe, 1978 or 1979 and it is at my home at the time in Marblehead, Massachusetts and that is my husband, Alan, and my sister, we called her Cookie or Muriel, and he kind of had a habit, he used to go like that on her head. I was a cute way of affection.

Q. The next picture is Exhibit 24.

Could you indicate who is in that picture?

A. This was at my – I believe, another social event. I am not sure which one. It may have been my niece's wedding, I believe it was, and my sister is the blonde here and that is myself in the red dress.

Q. Could you take a look at the last picture, number 25?

A. This is in 19 – it may have been '82, I am not sure. It was in 1982. It is the same dress. We shared clothing all the time. That is the same dress and it is my sister.

Q. Same dress as what?

A. It is the same dress. We would share our [p. 245] clothing. She would buy clothes and say let's trade this dress in these two pictures. We did that all the time. That

– we just were the same size. She was only two inches shorter than myself but we were exactly the same body build.

Q. Did your sister ever come down to visit you and your husband, Alan, in Boston?

A. Yes, quite frequently.

Q. When she did come to visit you where would she stay?

A. She had a room in my house. She had her own bedroom. When I bought that house, she had a room there.

Q. Did she come to see you at all in 1982 after she had her accident?

A. Yes. Yes, she did; many times.

Q. When your sister came to visit, did she often stay for periods of time?

A. Yes. Weekends, before – do you mean before '82 or –

Q. For the moment I am just in the period after the accident in '82 but let me break it down.

Prior to her having the accident how often would she come to visit you in Boston?

A. Prior to the accident, two or three – prior to the accident –

Q. I just need an estimate. I don't need an exact [p. 246] number.

A. Two or three times, possibly.

Q. After the accident, when she came down to visit you, how long did she stay?

A. She would stay long weekends and during the week sometime.

Q. During the period of time when she was visiting, did you have any discussions about your career and her career, that sort of thing?

A. We had discussions until the sun came up in the morning. We would not go to sleep. When she came in, we just talked and talked and talked. There was no time limit on it.

The sun would literally come up the next day and we would have to say, we have to go to sleep, we have to stop talking. We just connected so well in terms of so much information. She was just a wealth of information.

Q. At some point did she come to Boston on a more regular basis?

A. Yes. Kind of '81, 1981, late '81, she stayed quite frequently in my home and was bringing things from Albany to my house into that room.

THE COURT: Speak into the microphone, please.

THE WITNESS: I am sorry.

She would bring boxes and things.

[p. 247] Q. At some point did she have an apartment in Boston?

A. Yes, she did.

Q. Where was that?

A. 189 Bay State Road in Boston – Bay State Road in Boston she had an apartment.

Q. At the time when she was in Boston, did you observe her recovery, if any, from the automobile accident she had?

A. She still had pain. She stopped using the cane towards somewhere in '83, late '83. She wasn't using the cane anymore but she still had a limp, a slight limp, and she was still in pain and was using the TNS stimulator to relieve the pain.

Q. What was that, please, the stimulator?

A. It is an electronic device that you have leads that go in the muscle and it prevents muscle spasm. It relieves the spasm. It is quite effective.

That item and therapy were the two things that were quite effective in relieving the pain that she had.

She didn't complain much of pain. She was not a complainer but you could see in her face that she was.

Q. At the time of this air accident she still had some problems, didn't she?

A. You mean at the time – excuse me.

[p. 248] Q. At the time of the accident she was still having problems in the aftermath of the automobile accident?

A. Oh, yes, yes, she was.

Q. Had you observed her over the period of six months prior to the air crash getting better or getting worse from those problems?

A. She seemed to be getting much better, much better, and she went from crutches to cane and then not the cane so that is a progression towards being able to bear weight on that left leg, but I guess she still had the pain and was not able to stand or bear weight for very long periods of time.

Q. During the time when she was in Boston, did you ever have any health situations that she helped you out with?

A. Well, in September of '81 I was visiting her, I believe it was September, at the Bay State apartment, and I was pregnant, I was three months pregnant and I started bleeding, and the next day I was to have an ultrasound, just a regular routine ultrasound.

She, since I was very close, it was in the Boston area that my physician was, she immediately called the physician. He told me to stay on bed rest at her apartment.

The next morning she took me over to Beth Israel Hospital which I had an ultrasound taken and she was in the [p. 249] room and saw right on the ultrasound screen that the fetus was not alive.

Q. Did she spend time with you in the aftermath of that?

A. Yes. She – my physician suggested that I not have a D and C if it wasn't necessary to go under anesthesia.

She was a firm believer if you didn't have to go under anesthesia, not to do it, and – but the psychological difficulty of carrying a non-viable fetus or non-living fetus for ten days or two weeks or until you could naturally spontaneously abort was preferable to – I didn't want to go under anesthesia if I didn't have to, I was nervous about it and she said she would stay with me until I spontaneously aborted that fetus, and she did. I stayed at her apartment for 10 days and she cared for me and helped me.

Q. After that did you get pregnant again?

A. Yes, I did.

Q. At the time of the air crash in this case, how far along were you?

A. I was going into my sixth month when the airplane was blown up.

Q. Prior to the airplane flight did you talk about the upcoming child?

A. Yes. She was very excited about becoming an [p. 250] aunt. She was devastated by the loss of the first baby. She had prepared to become an aunt.

I mean, she was really very, very excited about it and it was almost like it was going to be her baby in a sense.

We were very close. We wanted to go through the birthing classes together. She would help me as a coach and then when that – when the baby died, she became very depressed by it but she was encouraging to me by helping me. We helped each other.

It was a symbiotic relationship, and she, when the second baby was – it – I was in my fifth month, she – she could feel the baby and she started naming names and she bought me the maternity outfits. She was the greatest person in the world you would have as a person who supported you, and was very excited, extremely excited over the prospect of becoming an aunt and taking over this baby, really helping out and encouraging me to not worry about that delivery.

I was very excited about it, too, so it was wonderful. It was a wonderful time in my life.

[p. 251] Q. And did you at that time when you were pregnant prior to the flight, ever have any discussions with your sister about what she would do with the west [sic] of her life, if she got better from this accident?

A. She was always a person who was very enthusiastic very vivacious, had many different options and plans. I mean, she could have gone back to work. She had a number of different options. She had a number of different options with her life. She was not a person to sit back and do nothing. She was a person who had worked always, it was full-time work, full-time school at the same time for 20 years and she was just ready to do something with her life, I believe when she returned – if she had returned, she would have definitely worked or done something with her life that I could have participated in, actually.

Q. And did she ever have children?

A. No. She never had children.

MR. NEEDHAM: May I approach the witness, your Honor?

THE COURT: Yes.

Q. Ms. Zicherman, I am showing you a book that was marked Exhibit 17, and I was wondering if you could tell the jury what the book is about and read the inscription in the front of that book.

A. One week before she boarded the flight, she gave [p. 252] me this book, and it's called Speaking of Sisters. It's a book with many different passages about what a sister meant to her and what special thoughts that had reminded her of me, and she gave me the book and started restating some of these different passages, but would you like me to read the inscription?

Q. Yes.

THE COURT: Is it something in evidence?

MR. NEEDHAM: We took a xerox and Plaintiff Exhibit 17, so that has been marked with a number, but a complete exhibit copy has been marked as Exhibit 17.

Was there some other objection?

MR. TOMPKINS: I have only produced a one-page document. It has not been produced, the whole document.

MR. NEEDHAM: One page, I think the rest of it should have been attached, if Mr. Tompkins would like to see the rest of it.

THE COURT: Suppose we take a break at this time. The jury is excused.

(Jury leaves the courtroom)

* * *

[p. 259] (The jury enters the courtroom)

THE COURT: All right. Would you like to proceed.

MR. NEEDHAM: Yes.

May I approach the witness, your Honor?

THE COURT: Yes.

MARJORIE ZICHERMAN, resumed.

DIRECT EXAMINATION

BY MR. NEEDHAM:

Q. Ms. Zicherman, I want to show you a copy of what has been marked as Plaintiff Exhibit No. 28. Can you tell me what that is?

A. This is the last will and testament of Muriel A.M.S. Kole, my sister.

Q. And prior to the break I was showing an inscription that was in front of a book that you received from your sister on August 23, 1983, and I want to show you what is now marked Plaintiff Exhibit No. 17 and ask if you can read that inscription to the jury?

[p. 260] A. It's dated August 23rd, 1983. "To my dearest Marjorie, you are the most wonderful sister anyone could ever hope to have. Lucky me. Unconditional love, Margie. Love always, Cookie."

Q. When did you first learn that your sister was going to be taking this flight to Seoul, Korea on KAL 007?

A. I believe it was, it may have been June – late spring, early summer.

Q. Was she going to Seoul on KAL 007?

A. She was being sponsored by the Business and Professional Women's organization to lecture on nutrition in Osaka, Japan.

Q. And when was the last time you saw her before she got on that airplane?

A. August 23, 1983, she gave me that booklet. It was a Hallmark booklet of poems. It's about sisters and what their relationship was like.

Q. And did you talk to her at all between the 23rd and the time she left on the airplane from Kennedy Airport?

A. I may have, but I don't recall.

Q. Did you talk to her when she was at the airport?

A. Yes, she called me from the airport.

Q. What did she tell you?

A. We had some light talk about how excited she was about going on the trip and how she would get some special [p. 261] hair combs for me, Japanese combs, small trinkets. That is what I wanted from Japan. And she said she would get me some very unusual, special ones.

There was some other conversation which I don't recall. Well, actually how the baby was and how excited she was and take care of yourself.

Then her voice became very, I would say, troubled and kind of in a whisper in a low key, and she said that

the plane was taking a different route, and I didn't understand what she meant. And I said, "What do you mean?" And she said, "Well, something about way points." And I said, "What is a way point?" And she said, "Well, that's where a plain [sic] goes.

Q. What else did she say?

A. She said, "I don't want you to be upset or very frightened, but I might not be coming back."

Q. Did she tell you anything about a letter?

A. She said that she was sending me a letter that I could look for this letter and that inside the letter was an inner envelope and the envelope should be opened if she did not run [sic] from this particular flight.

Q. And did you get that letter?

A. Yes, I did.

Q. And did you get that letter after finding out that the plane had crashed?

[p. 262] A. Yes, I did.

Q. How did you find out about the plane crash?

A. I saw news on the 6 o'clock news there was some mention of a missing airplane, Japanese flight, whatever. It didn't really connect at that point. But later on in the evening, somehow I became very concerned. The letter was in the back of my mind, and when her the plane was missing – there was more accounts of this plane being missing and the Japanese flight – it did connect in my head that there might be a connection between what my sister said and this plane being missing. And I wasn't

sure of the flight number. I didn't know if it was a 007 flight. She may have said that on the phone, but I couldn't tell you exactly that if she said that or not. She may have mentioned the flight number, but I was kind of listening to other things when she was talking.

Q. And when did you get the letter?

A. I received the letter two days after the plane was downed.

MR. NEEDHAM: May I approach the witness, you Honor?

THE COURT: Yes.

Q. I would like to show you what has been marked as Plaintiff Exhibit 27. Is that a copy of the letter that you got from your sister??

[p. 263] A. Yes, it is.

Q. And the letterhead on that is Sugarbush Inn. Do you know why that is on the letter she sent from Kennedy?

A. She may have been there at one time, I believe. She was there some vacation. She used stationery from different places because she was quite a frugal person.

Q. If you would please read that letter to the jury?

A. It's dated August 30, 1983. "Dear Margie, take good care of yourself. Don't be too upset about Cambridge – it was too good to be true. I had bad vibes about the 'Feathers' being involved in the marketing since the beginning. Eh, we've only just begun. I called Sue Gifford Fliegelman today" and in parentheses is "Tuesday" –

"and she said her lawyer told her about the company having serious problems Monday noon. It seems that her New York City Fifth Avenue lawyer had some contact with the Cambridge lawyer last week. All the crooks hand out together obviously. She called him Monday to ask his advice about investing $50 in a booth at the BPW Businesswoman's Fair I told her about and he advised her not to. To talk about inside information and bailing out early.

"I am in the airport now and have already gotten my seat. I am really excited about this trip – very low calorie diet paper and all. What a bust. It will be great fun. People are off to all parts of the world – too bad [p. 264] nobody has any money. Hooray it's for me. I've enclosed a few coupons for milk to fatten you up. Ha, ha. I'll be sure to look for some special hair combs and ornaments. Instead of the Philippines the plane is stopping in Anchorage, Alaska. Quite a difference in latitude.

"I've enclosed a small envelope to be kept by you and only opened in case I don't make it back for whatever reason. Nothing morbid. Nobody else on earth deserves it but you, for being such an ultra sister.

"It's great to enjoy the benefits that money can bring.

"Stay well. I'll be back soon." In parentheses, "I've got to get my videotape back from my rotten brother-in-law, love, Cookie."

Q. And was there anything else contained with that letter?

A. Yes. The envelope, it was a sealed envelope inside. The envelope on the outside said "For Margie, my

sister." Then it says, "I hope you never have to open this envelope. If you do, enjoy it to the fullest."

And I opened the envelope. The small papers, it was a small paper in it, and the paper was written in very tiny letters but it stated, "Take everything and spend it on yourself and the baby, if anything happens to me."

It's dated August 30, 1983. "In my room with the [p. 265] papers in my clothes closet on the left is a small chest. In the bottom drawing are all my bankbooks.

"No. 2. Next to the closet is a strong box, green tin.

"No. 3. Check my postal office box and get checks from my investments.

"No. 4. I've paid Michael C. Fina, I think, $2,000 for silver flatware. Pay him the balance of $3,800 or so and enjoy it.

"No. 5. Take any and all the clothes you want and wear them in good health.

I love you and tried to be a good sister, Cookie."

Q. When did you finely [sic] find out that that airplane had crashed and that your sister wasn't coming back?

A. That night, I heard – the next morning is when I actually knew that she was on the airplane. I called Kennedy Airport and I spoke to someone from Korean Airline at the airport and asked if she was a passenger on that plane and they said, "You'd better start praying."

Q. And how did you do in the aftermath of all that?

A. Well –

MR. THOMPSON: Your Honor, I am going to object and just request a side bar for a moment, please.

THE COURT: All right.

* * *

[p. 267] (In open court)

Q. Ms. Zicherman, the question I had asked was how did you do in the aftermath of your sister's death?

A. Oh, I was in shock. I was very frightened that I would lose the baby. I had just had a miscarriage previous to that, and I kept going to the doctor. I wanted to make sure the baby was still alive because I thought the heartbeat, I was listening to the heartbeat all the time. Anytime it didn't move, I was very concerned that I would lose the baby.

I wanted to go to Seoul and I wanted to throw flowers in the water and travel there, but my doctor advised against it. He thought it was not a good idea to do so?.

I was very ambivalent about it because I was supposed to go with her on that flight. So I felt very ambivalent about whether I should have been with her.

Q. You did have the baby?

A. Yes. I had the baby, December 30.

Q. And during the period of time that you were pregnant and in the aftermath of that, did you have any [p. 268] distress because of the loss of your sister?

A. I could not sleep. I would have small amounts of sleep, but the newscaster kept coming on. I kept looking

for more. I got caught up in the news and the media events that were going on. I would run out and get papers all the time.

I was working three days a week at the time and I was doing a very important study for the Squibb Company with a very important heart medication, and I was doing treadmill tests on patients. And I was a northeast regional director of this particular program and I was very – I could not concentrate on my work any longer at that point. I didn't know what to do at that point, but I still went in to work. I thought the best thing to do was to keep working. I thought I would lose my mind if I didn't, so I just kept working.

Q. Did you have any physical problems arising out of this emotional stress?

A. I developed TMJ which is temporomandibular joint pain on my left side. It was kind of like a lockjaw, and it was quite painful, but I have a high tolerance for pain, and I didn't want to let it bother me, and I didn't complain about it, but I did have serious nightmares.

Q. Any other physical problems?

A. Nightmares, very serious nightmares. I would [p. 269] picture myself on the airplane with my sister. I would be seated next to her in the plane thing like that it was very explosions and just I was awake, but it was a nightmare. I tried to hide it, but I lost some of my friends. They couldn't dealt [sic] with it, deal with me.

Q. Did you seek any help or counseling for those problems?

A. No. I didn't, but in retrospect, I should have I thought I could handle it all myself because I'm a psychiatric nurse and I thought that I could – I could really handle anything. Maybe it's because of my upbringing, I felt I could fix myself and not seek help.

I was a helper my whole life. That is what I did. I helped people who were in heavy-duty trouble all the time, and I never asked for help. I don't think I was capable of asking for help at that time.

Q. And has any of the anguish that you have suffered have any connection with the fact that you've never gotten your sister's body, it has never been recovered?

A. Oh, that is a nightmare in itself. There were some instructions also that she wanted me to bury her in a religious fashion, and I was not able to carry that out. I still feel very strongly that it would help me resolve this living nightmare by finding the body and burying her and having my sister, to visit the grave. There is no grave. I [p. 270] don't think I'll every have a grave. And if I go past a graveyard, I see people in there. And I don't even go in. And I wish I could go in and visit my sister. She deserved that the very least, the grave.

MR. NEEDHAM: I have no further questions.

Excuse me, your Honor. The witness wants to take a very brief break.

THE WITNESS: I would like just two minutes,

THE COURT: Let's take a five-minute recess.

You may come down.

Jurors, you are excused for five minutes.

(Jury leaves the courtroom)

* * *

[p. 272] MARJORIE ZICHERMAN, resumed.

CROSS-EXAMINATION

BY MR. TOMPKINS:

Q. Good afternoon, Ms. Zicherman.

My name is John Tompkins, as you know. We met sometime ago when we had your deposition in my office near here in New York.

I just have a few questions I would like to ask you. You mentioned something during your testimony that your sister had called you from the airport the night the flight was leaving, is that correct?

A. Yes.

Q. And I believe you said that she mentioned something about a change in way stations that she had?

A. No. She said something about way points.

Q. Way points, all right. Did your sister have any aviation or navigational background at all?

A. No.

Q. Was she a pilot?

A. No.

Q. I think you also said during your testimony that your sister had moved to Boston in 1981, approximately?

A. That is correct.

Q. And she had an apartment there?

[p. 273] A. Well she moved gradually. She was at my house and had a room and moved things from Albany to my house and then to this apartment in Bay State road.

Q. Approximately what year did she move into that apartment, do you remember? '81? '82?

A. Could have been '81, late '81, early '82.

Q. At the time that she moved into this apartment in Boston?

A. Right.

Q. Was she still married to Dr. Kole?

A. She was married to Dr. Kole at the time.

Q. Was Dr. Kole live being her in Boston?

A. No.

Q. Where was Dr. Kole living?

A. I believe he was in Albany.

Q. Do you still have in front of you Plaintiff Exhibit No. 27 which is the last will and testament of your sister?

A. Yes.

Q. You have that before you?

A. Yes, I do.

Q. If you would look at the first paragraph, would you just read that first paragraph to the jury, please?

A. "I, Muriel A.M.S. Kole, residing in Loudonville, State of New York, which I hereby declare to be my domicile, [p. 274] do hereby make, publish and declare this to be my last will and testament."

Q. And if you would, can you just turn to the next page and if you look down to the paragraph below nine where it says "in witness whereof." Do you see that?

A. Are you saying the last page?

Q. The second page?

A. The second page does not reflect what you are saying.

MR. TOMPKINS: May I approach the witness, your Honor.

THE COURT: Yes.

MR. TOMPKINS: On this document it is on the third page. I know the difference is due to the page size, your Honor.

Q. In any event would you look at the paragraph which begins "in witness whereof"?

A. Yes, I am looking at it.

Q. Can you tell me the date that your sister signed this will by looking at that photograph?

A. It's not very clear. It looks like the 30th day of July, '82.

Q. And that is after you say that she had moved to Boston, is that correct?

A. This.

[p. 275] Q. The execution of this document?

A. This says after the, that is correct.

Q. I have another document which I would like to show you. It was pre-marked as Plaintiff Exhibit 2. It was produced by your attorneys during the pretrial discovery in this case.

MR. TOMPKINS: Your Honor, may I approach the witness?

THE COURT: Yes.

Q. I show you that document, Plaintiff Exhibit 2 and ask you if you have received that document before?

A. Yes, I have.

Q. If you would turn to the second page, look at the bottom. Is that your sister's signature?

A. Yes, it is.

Q. And the stationery that was used in the same Sugarbush Inn stationery as the prior letter to you?

A. Yes, it is.

Q. And if you look on the first page on the upper right-hand corner, there's a return address?

A. Yes.

Q. Would you read that return address?

A. 42 Loudonwood East, Albany, New York.

Q. What is the date of this letter which is right underneath the address in the upper right-hand corner?

[p. 276] A. August 27, 1983.

Q. And that was just three or four days before she left on her trip, is that right?

A. That is correct.

Q. She was using the Loudonwood East, Albany address?

A. She was using that address.

Q. That is the address where her husband, Dr. Kole, lived at that time?

A. I am not sure he was living there. I believe he was living there at the time.

Q. But that was the address that your sister was living at the time prior to the when she moved to Boston?

A. Prior to the time she moved to Boston.

Q. When she was living there, she was living with her husband at that address?

A. When?

Q. Prior to her move to Boston.

A. I couldn't tell you exactly if they were living together before she moved to Boston or up until what point they were living together.

Q. Plaintiff Exhibit 2, if you take that letter in your hand it's the same one you had in your hand. It's addressed to Tony?

A. Right.

[p. 277] Q. Who is Tony?

A. He was a distributor for the Cambridge Diet.

Q. Was your sister working for the Cambridge Diet Plan?

MR. NEEDHAM: I'm going to object. I think were pointed on the direct examination. This is not relevant

MR. TOMPKINS: This is relevant to the economist about what her life pattern was. It is relevant, unless he is going to withdraw the economist.

MR. NEEDHAM: I don't think it is relevant at all. There has been no testimony about Cambridge diet or anything the economist had to say.

THE COURT: Well, he is asking her now about her knowledge. This is some place she was employed? You are suggesting, Mr. Tompkins?

MR. TOMPKINS:I think that the witness will be able to explain, your Honor.

THE COURT: Do you know what it was?

THE WITNESS: Yes. It was a liquid diet. It was in a can and it was a powder and you mix it with water and you consumed it, and you would – essentially it was a nutrition plan, a diet-weight loss.

Q. And was she involved with that corporation back at the time this letter was written August 1983?

A. Yes.

[p. 278] Q. And do you know how long she had been involved with that corporation prior to the date of that letter?

A. Not very long.

Q. Can you estimate? Six months? A year?

A. It was less than a year.

Q. Where was Tony located?

A. You mean where he lived?

Q. Yes, where he lived – where he worked, rather.

A. It was on Highland Avenue in Salem, Massachusetts.

Q. Would you again pick up Plaintiff Exhibit 2 and just read that letter to the jury?

A. "I am writing to keep you posted on my sales activities. You have been very helpful and suggestive since the beginning, and I appreciate your efforts.

"I currently have five persons signed up and they are Marjorie Zicherman, my sister in Marblehead.

"Muriel Mahalek, 42 Watergate Loudonwood Avenue, Loudonville, New York.

"Susan Gifford" – there are some numbers. Do you want me to read the numbers?

Q. For the benefit of the jury, just read the names.

A. "Karen Barr, Robert Roses of Jamaica, Vermont." The other one was East Greenbush, New York. They were all different areas in New York.

[p. 279] "I telephoned you a few times but I don't think you ever got my messages. My group sales have been about $2,000 a month, and I have been personally ordering about $500 or more for the past three months. This month I posted my letter of eligibility. Before my sponsor, Lois Martus left town, she said I should do this as soon as my PR was $2,000 hand I had five people in my group. That is where I am at now. Now that we can advertise I plan to really get going in Albany before anybody else does.

"Thank you for your newsletter. I found it very helpful. Also, I appreciate your contacting Cambridge about the price difference for the Rich Vanilla Shake. As soon as you get the order numbers on the Chocolate Nutrition bars, please let me know.

"I'm on vacation enjoying some of my profits from Cambridge and making new sales. Sincerely, Muriel Kole.

Q. And do you remember back when I took your deposition in August of this year?

A. Yes.

Q. And at that time you were under oath, were you not?

A. Yes.

Q. And I asked you some questions concerning what type of employment your sister was involved in?

A. Yes.

[p. 280] Q. And do you specifically remember telling me –

MR. NEEDHAM: Objection. Do we have a page number.

MR. TOMPKINS: Page 40.

MR. NEEDHAM: Could the witness be allowed to see for the witness to see if it refreshes here [sic] recollections, her memory?

MR. TOMPKINS: I haven't asked the question.

THE COURT: Is there an original transcript somewhere.

MR. TOMPKINS: I will give the transcript, your Honor, if she needs –

THE COURT: I was asking for myself.

Q. At that time when I took your deposition in response to my question regarding what your sister was doing, did you tell me that she had her own psychotherapy practice?

MR. NEEDHAM: If he has a specific question and a specific page, I think he should show the specific page and see it if it refreshes her recollection.

MR. TOMPKINS: I am asking if she recalls saying it, and if she doesn't recall saying it, that is the proper procedure.

THE COURT: First of all, you can only use this deposition taken before trial to impeach the witness, so you [p. 281] first have to ask her a question here which you think is contrary to her testimony on this deposition. That is the procedure.

MR. TOMPKINS: I understand, your Honor.

Q. Back in 1983 did your sister have a psychotherapy practice?

A. She had an office in her apartment for psychotherapy. She was setting up the office.

Q. Did she also have a nutrition counseling program?

A. She had purchased the product and was selling some of this product.

Q. Was that the Cambridge Diet?

A. That is correct.

Q. That was based in Albany though, wasn't it?

A. No, it was based in – it was not based in Albany. It started in Boston.

Q. Well, I understand the company did, but your sister was based in Albany, wasn't she?

A. No. She wasn't based in Albany.

Q. Wasn't that where she was distributing the product?

A. She had all her friends and her whole career was back in Albany, so the people she first sold to would have to be the people that she knew and people that she knew was the Albany area. She had been there for years. The people [p. 282] you see on they list are friends from Albany.

Q. Was your sister earning a salary from any of these ventures?

A. I don't know what salary she earned.

Q. During this trial we've had some testimony from some co-workers an [sic] friends of your sisters who were all friends from the Albany area. Did she have any friends in Boston?

A. She had me. That was her main contact.

Q. Did she have anyone else?

A. Yes. She had a friend in Boston.

Q. What was that person's name?

A. Her landlord, Arthur Choo.

Q. Was there anything more to that relationship than just a landlord?

MR. NEEDHAM: Objection, your Honor.

THE COURT: Yes, sustained.

MR. TOMPKINS: May I hand the clerk what's been pre-marked as Defendant Exhibit G, plaintiff's answer to interrogatories.

[p. 283] BY MR. TOMPKINS:

Q. Do you see the document that has been placed in front of you, Mrs. Zicherman?

A. Yes, I do.

Q. It is Plaintiffs Answers to Interrogatories Propounded by Defendant Korean Air Lines?

A. Yes.

Q. This was some pretrial discovery between the attorneys in this case early on.

If you would turn, please, to page 13, you see your name typewritten?

A. Yes, I do.

Q. Is that your signature above that name?

A. Yes, it is.

Q. Just above your name, could you read what that says to the jury?

A. Signed under the pains and penalties of perjury.

Q. You understood when you signed this that you were under oath?

A. Yes.

Q. You have seen this document before?

A. Yes.

Q. If you would go back to the first page, question number 4 says, state the name, date and place of birth, residence, occupation and occupational residence of the [p. 284] decedent at the time of decedent's death?

A. Yes.

Q. The decedent being your sister, is that correct?

A. That's correct.

Q. If you would just read me what is written in the answer with respect to your sister's address.

MR. NEEDHAM: Your Honor, in fairness, can she read the entire answer?

THE COURT: You want her to read part of the answer?

MR. TOMPKINS: I just want her to read the answer concerning the address. He has an opportunity for redirect if he likes, your Honor, but I would like her to read what her address was on the date of death?

THE WITNESS: What should I read?

Q. The answer that is written there beginning with "Muriel," and going to just before the date of birth.

MR. NEEDHAM: I would simply object to a partial answer.

THE COURT: As he says, you can bring it on redirect or have it read now under the rules for completeness, if it is necessary for completeness of the answer.

MR. TOMPKINS: It is not necessary for the question I have asked.

[p. 285] MR. NEEDHAM: It is a compound question with a long answer and I think it should be the whole answer.

THE COURT: All right. Read the whole thing.

MR. TOMPKINS: I will rephrase the question then.

Q. Would you look at question number 4? It asks you a variety of things one of which is the residence of your sister; is that correct?

A. Yes.

Q. The answer there, if you would read that for the jury with respect to your sister's residence? Can you read that to the jury beginning with "Muriel"?

A. Muriel A.M.S. Kole, 42 Loudonwood East, Loudonville, New York 12211.

Q. If you would turn back to page 13, next to your signature it says, dated, but the date is blank.

A. That's right.

Q. But if you look at the bottom there is a certificate of service there. Perhaps counsel will stipulate as to the date that it was served; if not, I will ask you to read the date.

MR. NEEDHAM: It is my certificate of service and I will stipulate that it says November 15, 1984.

THE COURT: These are answers to interrogatories of plaintiff; is that what this is?

MR. TOMPKINS: Yes.

[p. 286] THE COURT: Is this in evidence?

MR. TOMPKINS: Yes. It has been marked as Defendant's Exhibit G. I don't believe there is any objection.

THE COURT: We should receive these in evidence so they can be marked in evidence.

(Defendant's Exhibit G for identification was received in evidence)

MR. TOMPKINS: I don't have any further questions.

THE COURT: You have no further questions?

MR. NEEDHAM: I have just a few.

REDIRECT EXAMINATION

BY MR. NEEDHAM:

Q. Mrs. Zicherman, this Plaintiffs' Exhibit 2 about the Cambridge Diet that my brother asked you about, in this letter it shows that your sister has five people lined up for this diet program, does it not?

A. Yes, it does.

Q. One is you?

A. Yes.

Q. One is your mother?

A. Yes.

Q. And one is a friend named Sue Gifford?

A. That's right.

[p. 287] Q. One is a friend name [sic] Karen Barr?

A. Yes.

Q. And one is a friend named Robert Moses?

A. Yes.

Q. She had just signed you all up, hadn't she?

A. Yes.

Q. In your letter that you got from the airport dated August 30, 1983, she talked about how some diet program had gone bust.

Is this the diet program that she was talking about?

A. It really didn't go bust but she thought it did at the time.

Q. At the time of her death, was she living on Bay State Road in Boston?

A. Yes, she was.

MR. NEEDHAM: No further questions.

THE COURT: All right. Thank you. You can come down.

There is nothing further?

MR. TOMPKINS: No, your Honor.

THE COURT: The jury is excused until 10:00 tomorrow morning.

Please be on time, ladies and gentlemen.

(The jury leaves the courtroom)

* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF NEW YORK

TESTIMONY OF MURIEL
MAHALEK

[p. 295] MR. NEEDHAM: The Plaintiffs call Mrs. Mahalek to the stand.

MURIEL MAHALEK, called as a witness by the plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION:

BY MR. NEEDHAM:

Q. Mrs. Mahalek, was Muriel Kole your daughter?

A. Yes, she was my daughter.

Q. When was she born?

A. I beg your pardon.

Q. When was she born?

A. She was born November 24, 1942.

[p. 296] Q. She had a younger sister named Marjorie?

A. Yes.

Q. When was Marjorie born?

A. January 30, 1948.

Q. Where did you and your daughters grow up?

A. In Brooklyn, New York.

Q. While they were growing up, had you been employed or was your husband employed?

A. Not the first few years. My husband was employed, yes, but I didn't go to work until about 1955.

Q. What did you husband do?

A. My husband was a transit authority motorman.

Q. What did you do in 1955 when you went to work?

A. Well, I first started as a clerk, office clerk.

Q. Then what did you do?

A. I worked there about three years and then I went to Wall Street. I worked on Wall Street in a brokerage firm seven years and then I worked two years at St. Vincent's Hospital and then I went to work in 1968 for the transit authority as a subway token clerk.

Q. What is your educational background, Mrs. Mahalek?

A. I went to high school except for the last month. Then I got married before I graduated.

Q. Could you tell us or tell the jury a little bit [p. 297] about Muriel Kole, your daughter, in terms of her educational experience, what schools she went to and how she proceeded through with her education?

A. Oh. My daughter, Muriel, went to Public School 242, the neighborhood school. She then went to Prospect Heights High School, finished her high school career. That was in 1960. She then won a scholarship to Brooklyn Hospital, school of nursing. That was from 1960 to 1963. She graduated from the school of nursing there, in 1963, around June, and then she started to be employed at that

hospital where she was in training at Brooklyn Hospital as a nurse.

Q. At the time she was going through that, you had a younger daughter, Marjorie, didn't you?

A. Yes.

Q. Growing up, how would you characterize the relationship between Marjorie and Muriel, your two daughters?

A. The way I treated them, you said?

Q. What was their relationship like?

A. The two sisters?

Q. Yes.

A. Well, the two sisters, Muriel was the older of the two so she took over, she felt like she was the mother of her younger sister. They were like – she always took [p. 298] care of her. They were very close together, friendly and close.

Q. Could you just go through in a little detail what you daughter's career was as she continued to go through the different schools she attended; after she became a nurse, what came next?

A. Muriel?

Q. Yes.

A. Oh, after Muriel became a nurse, she then got married. She got married in 1964. When she got married she lived in Queens and worked at another hospital there in Queens.

She stayed in New York about two years and then she moved up to Albany. Then she continued her education also while in Albany. She went to another school. Later she went to another school and later on she kept continuing her school all through these years and she finally went to Russell Sage College for her degrees.

Q. Did you follow her career from your home in Brooklyn?

A. Yes.

Q. During this period of time while – up until 1980 or so, would you talk to your daughter on the telephone from time to time?

A. Naturally, yes, I did, yes, yes.

[p. 299] Q. During that time she was in Albany, was she not?

A. Yes, that's correct.

Q. Mrs. Mahalek, when did you first learn that your daughter was on KAL Flight 7?

A. I first learned that she was on that flight when my son had called me about the flight.

Q. What did he tell you?

A. Well, that was September 1, and I was in my home here in Brooklyn and my son – oh, I had the television on and there was news on about this plane. But I didn't know she had taken that flight exactly. But then the phone rang and my son had called me and he had told me that he had reason to believe that my daughter was on that plane that was shot down.

Q. What did you do then?

A. Well, I didn't want to believe that. I became distraught. I was home alone. I became distraught. I wasn't aware that she had been on the plane, and I called to my daughter's home there at Loudonville to check out, to see what happened, if this were true. I didn't want to believe it. I didn't want to accept that.

Q. At that time did you know where your daughter was living, your daughter, Muriel?

A. No, but I called there where, the home where she and Michael had been living.

[p. 300] Q. What did you do then? When you called the home in Loudonville, did you speak with anybody?

A. When I called the home in Loudonville? I learned that my daughter definitely was on that plane, and then I had packed my bag because my son told me that I leave my home and come up there by him because I was alone at home in Brooklyn.

That was Rochester. My son lived in Rochester and I was home in Brooklyn on that day and he suggested, he made flight arrangements that I come immediately to Rochester to be with part of my family.

Q. After you got to Rochester, did you make any plans for any service of Muriel?

A. Not at that time, no.

Q. When did you make those plans?

A. I didn't make those plans.

Q. Did you have a memorial service?

A. There was a memorial service – yes, there was a memorial service for Muriel in Loudonville September 28, 1983, St. Pius The Tenth church.

Q. Did you attend that?

A. Yes.

Q. Was Marjorie there?

A. Yes.

Q. Could you tell me, Mrs. Mahalek, in the aftermath [p. 301] of Muriel's death, did you have any problems, any personal problems?

MR. TOMPKINS: Objection, your Honor. May I request a sidebar at this time?

THE COURT: Is this something I previously ruled on?

MR. TOMPKINS: Yes. I would just like a standing objection.

THE COURT: Well, let the record reflect you have a standing objection.

MR. TOMPKINS: Thank you, your Honor.

THE COURT: Let's proceed.

Q. Mrs. Mahalek, in the aftermath of your daughter's death, could you tell us, just describe your experience to the jury?

A. In the aftermath of my daughter's death? First of all, I didn't want to accept it. The news that I had heard

that my daughter had been on that plane, I couldn't believe it, I didn't want to accept it, and I had checked it out, as I said, and it was true, and I tried to put myself together.

I stayed at my son about a week constantly listening to the TV and everything hoping that the news that I heard would be retracted, that my daughter was not – she wasn't on that plane.

[p. 302] I was all upset, so then I tried to check out everything. I wrote – I wrote a letter to President Reagan, I wrote to Moynihan and I wrote to D'Amato that the news I had heard and that please try to verify it for me that my daughter was on that plane, and that there was no bodies recovered.

I couldn't accept that that was the end. I kept writing letters and persuing [sic] this, please help me find out something.

In the first weeks that it occurred I wrote everyone and I received responses from the State Department and D'Amato and President Reagan at the time expressing their sympathy, but they didn't explain very much about it.

Q. In the period of time following that, did you have any other problems; by "problems," I mean coping with the loss of your daughter?

A. Yes, I did. I was very upset. I was very upset and I – I was heartbroken naturally because that was a part of me, and I refused to accept it, that there was no one, that they didn't find anyone, that there was no body to be recovered. I couldn't cope with that, with the issue. I

couldn't cope with the issue that she had been taken, she was gone, and it wasn't an illness.

If it was an illness, maybe, but she was just taken suddenly. It was an untimely and tragic death that [p. 303] she went through. I couldn't accept that. It wasn't necessary. I felt it didn't have to be.

Q. Does the fact that this death was caused by the willful misconduct of Korean Air Lines affect this anguish that you are undergoing?

MR. TOMPKINS: Objection, your Honor.

THE COURT: What is the objection?

MR. TOMPKINS: Willful misconduct. There has been a prior ruling in this case, he brought it up in this case, and I request an immediate mistrial.

THE COURT: The jurors should be advised that the jury in Washington found willful misconduct in order for the airline to be liable in these circumstances.

Let's proceed.

Q. Has that exacerbated in any way this mental anguish you described, the fact that it was caused by the willful misconduct?

A. Well, yes, because, you see, I worked in the subways and I took some time off. It was difficult for me to have a happy face and take care of people, say good morning and everything and inside I was broken hearted.

I was crying all the time. I couldn't work for a little while. I found it very hard that – it wasn't a very nice state and I had to smile and be polite to my passengers.

Inside I was crying and I – it was difficult [p. 304] to work.

I did have to go back, but –

Q. Does the fact that the accident or does the fact that the accident was caused by the willful misconduct of Korean Air Lines make it more difficult for you to accept?

MR. TOMPKINS: Objection.

THE WITNESS: As I said, to me I felt it was a needless thing and I never would expect that I would see a time that a daughter or a child of mine would precede me in death. It wasn't a likely thing.

It was more devastating to the fact that my daughter went, was taken away and preceded me in death which it was devastating to accept.

Q. Mrs. Mahalek, when is your birthday?

A. My birthday?

Q. Not the year, just the day.

A. What is that?

Q. What day is your birthday?

A. April 29.

Q. Would you and Muriel normally get together on your birthday?

A. Yes.

Q. What would you usually do?

A. Well, she would take me out to dinner if it were – if the availability of the time. She would take me out [p. 305] to dinner on my birthday.

Q. On your birthday in 1983 did she take you out for dinner?

A. Yes. April 29, 1983, that was the last time I saw my daughter. She took me to dinner.

Q. Mrs. Mahalek, when you went to dinner with your daughter in 1983, that was your birthday?

A. Yes.

Q. April 29?

A. Yes.

Q. And as your birthday was approaching in 1987, did you have any particular problems?

A. In 1987? Well, my birthday was approaching, yes, I –

Q. Could you tell the jury what happened?

A. In 1987, it was approaching the time again where I would probably plan to go to dinner and I was reading, going through some of my things and reading – one of the books that was written about this affair which I read almost every book that was written and every piece of literature I could pursue on this to find out exactly what had happened in this case, and I was reading the book, and I was very depressed that time, and because of that and things I attempted to take my life. I attempted to commit suicide.

Q. What happened, what did you do, Mrs. Mahalek? [p. 306] What happened?

A. What happened?

Q. Specifically, what did you do?

A. Oh, I took a knife and I cut my throat here and I cut myself over here.

Q. Were you admitted to hospital?

A. Yes.

Q. Which hospital was that?

A. Brookdale Hospital, Brooklyn, New York.

Q. Were you admitted to that hospital?

A. Yes.

Q. Did you have surgery for the injuries you sustained?

A. I had surgery the evening I was brought in, yes.

Q. Then were you an in-patient for a while?

A. Yes, I was an in-patient there, yes.

Q. You had some ongoing therapy and counseling since then, haven't you?

A. Yes.

Q. What kind of ongoing counseling or therapy did you have?

A. What kind of therapy? While I was there, I had a medication, an antidepressant, one type of medication, an

antidepressant, and then I was released and then I was going to bereavement counseling to help adjust people for [p. 307] bereavement.

I went to counseling, that was talking, and when I went to counseling they start to cut down on the medication.

When I left the hospital they had given me the pill, antidepressant, and at counseling the medication was gradually brought down to take you off it and then you had an individual counseling, once or twice a week, I went, and then I no longer needed the medication, was taken off, and then they had group therapy where you meet other people who have various types of problems and they talk. You can talk group therapy.

Q. For how long did you go to group therapy?

A. I went once a week, that was in 1987, 1987, yes, and I go, then it was – you are required to go, and after the medication was stopped, I went on a voluntary basis.

I still go once or twice, even, steadily, since 1987 for counseling, talking with groups, voluntarily now because I no longer have any medication of anything but I found it was good.

Q. How are you doing now?

A. I am – I am fine now. I have no medication whatsoever of any type.

Q. Mrs. Mahalek, do you attend any church in Brooklyn where you live?

[p. 308] A. I go every Saturday to my local parish, to mass, 5:00, every Saturday. I am a steady parishoner [sic], yes.

Q. Is there another church near your house?

A. Yes. We have another church in Brooklyn there, St. Jude Parish, where there is a – there is a shrine room, it is a shrine to St. Jude, and they have a room there with memorial candles for deceased members of your family. So we had no body, no remains from Muriel, no cemetery, no place to visit.

So at this church I purchase – they have a memorial candle that is lit, it is electric and it is lit for one year straight, it never goes out, and I purchased that. I purchased that is 1990 and every year I continue to purchase that candle which the light has not gone out.

September 1 is the Memorial Day of the flight disaster and every September 1 I renew the candle and I spoke to my parish priest there and I told him that since I had nobody, I have no cemetery to visit, this is my place, I go there to that.

There is a plaque on it that says, in memory of Muriel Mahalek Kole, requested by loving mother.

That is a memorial candle and it is still lit. I go there as a substitute for a grave place to visit.

MR. NEEDHAM: No further questions.

CROSS-EXAMINATION

[p. 309] BY MR. TOMPKINS:

Q. Good morning, Mrs. Mahalek.

A. Good morning, sir.

Q. As you know, my name is George Tompkins. We met a couple months ago when I took your deposition in my office.

A. Yes, yes.

Q. When did your daughter, Muriel, move out of the house?

A. My house?

Q. Yes.

A. Excuse me. One moment please.

Q. Sure.

A. My daughter moved out of the house when she won the scholarship to Brooklyn Hospital to become a nurse. She had to reside in the hospital there and the scholarship was classes and floor practice. That was the term of the scholarship. She had to live in Brooklyn Hospital. That was 1960.

Q. 1960, that is when she moved out of the house?

A. Yes. She moved into the hospital and started her career of studying and taking care of people at the same time. That was her schooling to prepare for her nurse's certificate.

Q. At any time after she moved out initially did she [p. 310] ever move back into the house?

A. No, no, because when she graduated, as I said, from that, she got a job right there and lived there also, in Brooklyn Hospital, and then she married.

Of course, from the time that she won the scholarship and started the schooling she never came back to the house.

Q. When did you retire from the transit authority?

A. I retired the day I was 65.

Q. Which is what year?

A. 1985, after 17 years in the subway.

Q. During the time that you worked for the transit authority, were you financially dependent at all on Muriel Kole?

A. I was never financially dependent on any of my children, never. I worked steadily from about 1955 to the 1985, never a day's unemployment. I worked sometimes – in the beginning I had worked two jobs before I had the transit and then with the transit I would work as much overtime as I could. I never relied on my children.

Q. I want to ask you some questions about the suicide attempt that you discussed with Mr. Needham on his direct exam.

A. Yes.

Q. Isn't it true that when you went to the hospital [p. 311] the day that you stabbed yourself that you told them that you thought you had cancer and that was the reason that you stabbed yourself?

A. One of the reasons. I said I thought I had cancer and I was depressed also about – it was a culmination of traumatic things that occurred through my lifetime which the death of Muriel was an added traumatic thing to me.

Q. What other things had occurred through your lifetime that had contributed to this feeling that you wanted to commit suicide?

A. What other things was, well, while I was working, while I had been working I had been held up on my job, robbed at the booth, subway, I had a home robbery in my house while I was in the bedroom of my home while I was employed at the transit. Someone had come in and I was terrified and I woke up and chased them and after that I couldn't sleep so – I couldn't sleep because of the robbery and I took the midnight shift because – instead of sitting up all night, I worked the midnight shift in the subways, 12:00 to 8:00, and I would sleep during the day. At night I was afraid. After someone first entered my home, that was a traumatic thing.

I had a car stolen three times and wrecked on me. My whole life – my mother had died when I was two and I had [p. 312] foster parents.

My life with my husband wasn't – I was married in 1938 and I didn't have a very easy time with my husband. My husband was 12 years older than I.

I had three children, and there were traumatic things. Traumatic things? Yes. I had a son. When he was 5 he was stricken with polio which was a year in the hospital at the time that Muriel was born, and there were traumatic things like that, events like that, and my son had – many things through the marriage.

My son had been born with a club foot which required also my constant attention all the time and traumatic things to my mind that these things didn't happen but they all did happen to me.

Q. I think you also testified during your direct exam that the last time you saw your daughter Muriel was for your birthday?

A. Yes, it was.

Q. That was here in New York?

A. Yes, it was in New York, yes.

Q. How often would you see your daughter on a yearly basis, say, for the last five years, from 1978 to 1983?

A. '78 to '83, oh, those were my working years. Not too often.

My daughter had, as you heard, quite a busy [p. 313] schedule with – between her schooling and her work layout and things and I, my shifts were different. It was difficult to get together because of my job.

My job was with the city transit. I did not get holidays off. It goes by seniority. I did not get choice of hours, but I had – I never worked mornings.

I worked 4:00 to 12:00 and midnight to 8:00 which getting together with Muriel was difficult. As I said, holidays were on a priority basis according to your seniority. I would work the holidays. I couldn't get the holidays off.

If I could work 16 hours, two shifts, I worked because I had to support myself. My husband was deceased in 1979 so I worked all the overtime I possibly could so that I could retire before the 20 years, and I worked all the time. That was what I did.

I was alone in Brooklyn and I worked. I enjoyed the job except for when – when it was good, when I wasn't held up. I liked the work. I liked working with the people. I liked the job but –

MR. TOMPKINS: Thank you. I have no further questions for you.

MR. NEEDHAM: I have no further questions of this witness.

THE COURT: Thank you.

* * *

Plaintiffs' Exhibit 17

August 23, 1983

To my dearest Marjorie,

You are the most wonderful sister anyone could ever hope to have. Lucky me! " 'Unconditional love' – Margie."

Love Always,

Cookie

PLAINTIFFS' EXHIBIT 27

SUGARBUSH INN

[1090]

August 30, 1983

Dear Margie,

Take good care of yourself. Don't be too upset about The Cambridge – it was too good to be true. I had bad vibes about The "Feathers" being involved in the marketing since the beginning. Eh! We've only just begun. I called Sue Gifford Fligleman today (Tues) and she said her lawyer told her about the company having serious problems Monday noon. It seems that her N.Y.C. 5th Ave. lawyer had some contact with The Cambridge lawyer last week – all the crooks hang out together obviously. She called him Monday to ask his advice about investing $50 in a booth at the BPW Businesswomen's Fair I told her about, and he advised her not to! Talk about inside information and bailing out early.

I'm in the airport now and have already gotten my seat. I'm really excited about this trip – very low calorie diet paper and all. What a bust. It will be great fun. People are off to all parts of the world – too bad nobody has any money. Horay [sic] – Its For Me!

I've enclosed a few coupons for milk to fatten you up. HA, HA. I'll be sure to look for some special hair combs and ornaments. Instead of the Phillapines; the plane is stopping in Anchorage, Alaska. Quite a difference in latitude.

I've enclosed a small envelope to be kept by you and only opened in case I don't make it back – for whatever reason: nothing morbid.

Nobody else on earth deserves it but you, for being such an ultra sister.

Its great to enjoy the benefits that money can bring.

Stay well, I'll be back soon (I've got to get my video-tape from my rotten brother-in-law.)

Love,

Cookie

I hope you never have to open this envelope – if you do – enjoy it to the fullest.

Take everything and spend it on yourself and the baby if anything happens to me.

August 30, 1983

1. In my room with the papers is my clothes closet on the illegible is a small chest – in bottom drawer are all of my bank books.

2. Next to the chest is a illegible.

3. Check my Post Office Box where I get checks from investments.

4. I've paid illegible I think $2,000 for silver flatware. Pay him the balance of $3,800 or so and enjoy it.

5. Take any & all the clothes you want & wear them in good health. I love you & tried to be a good sister.

Cookie.

For Margie – My Sister

PLAINTIFFS' EXHIBIT 28

LAST WILL AND TESTAMENT

of

MURIEL A.M.S. KOLE

I, MURIEL A.M.S. KOLE residing in Loudonville, State of New York, which I hereby declare to be my domicile, do hereby make, publish and declare this to be my Last Will and Testament.

FIRST: I revoke all Wills and Codicils at any time heretofore made by me.

SECOND: I direct that all my just debts and funeral expenses be paid out of my estate as soon after my death as may be practicable.

THIRD: All the rest, residue and remainder of the property both real, personal and mixed and wheresoever situate which I may own or be entitled to at the time of my death, I give, devise and bequeath as follows: 1) I give, devise, and bequeath one-third (1/3) of my estate to my spouse, MICHAEL A. KOLE, if he shall survive me. If he shall not survive me, I give, devise, and bequeath the above one-third (1/3) share to my issue, if any, per stirpes, and if no issue survive me, then to my sister, MARJORIE D. ZICHERMAN or to her issue, per stirpes; 2) I give, devise, and bequeath the remaining two-thirds (2/3) of my estate to my issue, if any, per stirpes, and if no issue survive me, then to my sister, MARJORIE D. ZICHERMAN, or to her issue, per stripes. If my said sister or issue do not survive me, then to those persons to whom and in those proportions in which the same would have

been distributable if I had then died the owner thereof, intestate, and resident of the State of New York.

FOURTH: I hereby appoint my sister, MARJORIE D. ZICHERMAN to be the Executor of this my Last Will and Testament.

I direct that none of my Executors shall be required to give any bond or other security for the faithful performance of their respective duties in any jurisdiction whatsoever, or if any bond is required, no surety shall be required thereon. No fiduciary at any time acting hereunder shall be required to file periodic accountings in the Court in which this Will shall be admitted to probate unless such fiduciary shall elect to do so. To the extent that any of my Executors shall exercise discretion hereunder and make payment and/or application of assets as herein provided they shall be relieved of any and all responsibility and liability with respect to the same.

FIFTH: I hereby appoint my above-mentioned spouse, as the Guardian of the person and property of my children during their respective minorities. If my spouse does not survive me, or fails to qualify, or having qualified, dies, resigns, or becomes incapacitated before all of my children attain the age of eighteen (18) years, I hereby appoint my sister, MARJORIE D. ZICHERMAN, as Guardian of the person and property of my said children during their respective minorities.

I direct that no Guardian shall be required to furnish any bond or other security in any jurisdiction for the faithful performance of his duties.

SIXTH: My Executor shall have discretion to make payment or distribution of any principal and/or income vesting in and payable to any minor in any one or more of the following ways:

(a) paying the same to the parent, guardian or other person having the care and control of such minor and the receipt of such payee shall be full acquiescence to my Executor,

(b) paying the same to any relative of the minor as custodian for the minor under any applicable Gifts to Minors Act, or

(c) deferring payment or distribution of any part or all thereof until the minor comes of age, meanwhile applying to such minor's use so much principal and income therefrom, and at such time or times as my Executor may deem advisable. Any income not expended by my Executor shall be added to principal and my Executor shall pay over and disburse the principal to the minor upon such minor attaining the age of eighteen (18) years or to the estate of such minor if the minor dies under the age of eighteen (18) years.

SEVENTH: My Executor shall have all the powers and authority which are now conferred upon fiduciaries (expressly including, but not limited to, those powers enumerated in the Fiduciaries Powers Act, Section 11-1.1 of the New York Estates Powers and Trusts Law) or which may hereafter be conferred by law upon Executors. In addition to the foregoing powers and authority, I fully authorize and empower my Executor to retain any and all property, and also, to invest any and all property, real or personal, which at any time may constitute part of my

estate, in any stocks, bonds, common trust funds, securities of investment companies or other securities regardless of any rule regarding diversity of trust investments.

EIGHTH: I direct that all inheritance, estate, transfer, succession and death taxes or duties (including any interest thereon) imposed by any jurisdiction whatsoever by reason of my death upon or in relation to any property includable in my estate for the purposes of any such taxes or duties, whether such property passes under the provisions of this Will, or outside the provisions of this Will, be paid out of my general estate without proration or apportionment.

NINTH: Wherever the terms "Executor" or "Executors" are employed herein, the same shall be deemed to include the terms "Executrix" or "Executrices" or their alternates or successors, as the case may be.

IN WITNESS WHEREOF, I hereby sign, seal, publish and declare this to be my Last Will and Testament and initial each page, in the presence of the persons witnessing it at my request this 30th day of July, in the year One Thousand Nine Hundred and Eighty-two.

/s/ Muriel A.M.S. KoleL.S.

The foregoing was on said date subscribed, sealed, published and declared by the Testatrix as her Last Will and Testament, in our presence and we at her request, and in her presence and in the presence of each other, subscribed our names as witnesses (the final sentence of the Will beginning with the words, "IN WITNESS

WHEREOF" having been read aloud in her and our presence), all of us, including the Testatrix being present throughout the execution and attestation of this Will.

Lori E. Lee residing at 520 Madison Ave, Albany N.Y. 12208

Jennifer Rai Schmaly residing at 381 Madison Ave. Albany, N.Y. Illegible

Richard A. Artessa residing at Madison Ave. Albany, N.Y.Illegible

---

AFFIDAVIT OF SUBSCRIBING WITNESS

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

Lori E. Lee, Jennifer Rai Schmaly, and Richard A. Artessa, each of the undersigned, individually and severally, being duly sworn, depose and say:

The within Will was subscribed in our presence and sight at the end thereof by Muriel A.M.S. Kole, the within named Testator(rix); on the 30th day of July, 1982, at 42 State St., Albany New York.

Said Testator(rix) at the time of making such subscription declared the instrument to be his (her) Last Will and Testament.

Each of the undersigned thereupon signed his name as a witness at the end of said Will, at the request of said Testator(rix) and in his(her) presence and in the presence and sight of each other.

Said Testator(rix) was, at the time of so executing the said Will, over the age of eighteen (18) years and, in the respective opinions of the undersigned, of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a Will.

Said Testator(rix), in the respective opinions of the undersigned, could read, write and converse in the English language and was suffering from no defect of sight, hearing or speech, or from any other physical or mental impairment which would affect his(her) capacity to make a valid Will. This Will was executed as a single, original instrument and was not executed in counterparts.

Each of the undersigned was acquainted with said Testator(rix) at such time and makes this affidavit at his(her) request.

/s/ Lori E. Lee
/s/ Jennifer Rai Schmaly
/s/ Richard A. Artessa

Severally subscribed and sworn to before me this 30th day of July, 1982.

/s/ Illegible
Notary Public

[Seal]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 542, 667 August Term, 1993
Argued: Decided:
October 28, 1993 November 3, 1994

Docket Nos. 93-7490; 93-7546

MARJORIE ZICHERMAN, individually and as executrix under the estates of Muriel A.M.S. Kole; MURIEL MAHALEK, mother and next of kin of Muriel A.M.S. Kole,

Plaintiffs-Appellees/
Cross-Appellants,

MICHAEL KOLE,

Plaintiff,

-against-

KOREAN AIR LINES, CO., LTD.,

Defendant-Appellant/
Cross-Appellee.

Before: LUMBARD, VAN GRAAFEILAND, and WINTER, *Circuit Judges*.

Appeal from a judgment entered in the District Court for the Southern District of New York (Motley, *J.*) on April 12, 1993, following a jury verdict in a wrongful death action. Plaintiffs cross-appeal the trial court's calculation of prejudgment interest.

Affirmed in part, vacated in part, and remanded in part.

W. PAUL NEEDHAM, Boston, Massachusetts, (Needham & Warren, Boston, Massachusetts, Kevin M. Hensley; Christopher Lovell, New York, New York, of counsel), for Plaintiffs-Appellees/Cross-Appellants.

ANDREW J. HARAKAS, New York, New York (Condon & Forsyth, New York, New York, George N. Tompkins, Jr., Jeanine C. Veracoechea, George N. Tompkins, III, Peter F. Tamigi, of counsel), for Defendant-Appellant/Cross-Appellee.

LUMBARD, *Circuit Judge*:

These appeals were argued on October 28, 1993. We delayed our determination pending a decision in *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, slip op. 7795 (2d Cir. Sept. 12, 1994) (*"Lockerbie II"*), which already had been heard by a different panel on May 19, 1993.

Korean Air Lines Co., Ltd. ("KAL") appeals from a judgment of the Southern District of New York (Motley, *J.*) entered on April 12, 1993, following a jury verdict which awarded damages of $251,000 to Marjorie Zicherman and $124,000 to Muriel Mahalek, the surviving sister and mother, respectively, of KAL passenger Muriel Kole. After trial, the district court granted prejudgment interest on the judgment, but discounted the jury award at a rate of 2% per annum to the date of the accident in calculating prejudgment interest. *Zicherman v. Korean Air Lines Co., Ltd.*, 814 F. Supp. 605, 612 (S.D.N.Y. 1993).

KAL argues that: (1) federal maritime law precludes plaintiffs' recovery for loss of society; (2) federal maritime law precludes plaintiffs' recovery for mental injury

or grief; (3) the evidence was insufficient to sustain an award to Zicherman as executrix of the estate for Kole's conscious pain and suffering; and (4) the evidence was insufficient to sustain an award to Zicherman for loss of support and loss of inheritance. Plaintiffs cross-appeal the court's discounting of prejudgment interest.

The awards for pain and suffering, loss of support, and loss of inheritance, and the district court's calculation of prejudgment interest, are affirmed. The awards for mental injury are vacated. The awards for loss of society are vacated in part and remanded in part.

I.

On September 1, 1983, KAL flight KE007, en route from New York to Seoul, South Korea, strayed into Soviet airspace over the Sea of Japan and was shot down. All 269 persons on board died, including Muriel Kole. Zicherman and Mahalek, surviving relatives of Kole, brought suit in the Southern District of New York to recover damages.

The Judicial Panel on Multidistrict Litigation transferred all federal court actions arising out of the disaster to the District of Columbia for trial on the common issue of liability. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 575 F. Supp. 342 (J.P.M.D.L. 1983). After a jury determined that the crash was proximately caused by KAL's "willful misconduct," *see In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 112 S. Ct. 616 (1991), the Multidistrict Panel remanded the individual cases to their courts of origin to determine damages.

Prior to trial of Zicherman and Mahalek's damages, KAL moved for a determination that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761-768 (1988), limited recovery to pecuniary losses. Judge Motley denied the motion, holding that plaintiffs as close surviving relatives could recover for loss of love and affection ("loss of society") and for mental injury and grief, and that Zicherman as executrix of Kole's estate could recover for Kole's pre-impact conscious pain and suffering. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 807 F. Supp. 1073, 1080-88 (S.D.N.Y. 1992).

At trial, two expert witnesses testified as to Kole's conscious pain and suffering. James Foody, an aeronautical engineer, testified that the Soviet aircraft fired two missiles, which struck the KAL plane at an altitude of 35,000 feet; that the missiles probably caused a five foot hole in the rear fuselage; and that the plane remained airborne for twelve minutes thereafter. Robert Elzy, an aviation physiologist, testified that such a hole would cause rapid decompression of the plane; that passengers would experience intense pain in their ears, sinuses, lungs, stomach, and intestines due to decompression; and that passengers had sufficient time to don oxygen masks which would allow them to remain conscious during the plane's descent.

Zicherman testified that she had received financial assistance from Kole. Kole had paid Zicherman's wedding expenses and had volunteered to finance Zicherman's purchase of a new home. Prior to Kole's flight, Zicherman – who was then pregnant – received an envelope to be opened in the event of Kole's death; the envelope contained a letter describing Kole's assets and

stating, "[t]ake everything and spend it on yourself and the baby, if anything happens to me." In contrast, Mahalek stated on cross-examination that she was never financially dependent on Kole.

The jury returned a total verdict of $375,000 as follows:

Mahalek	
1. Mental injury	$96,000
2. Loss of society	$28,000
Zicherman (personal capacity)	
3. Mental injury	$65,000
4. Loss of society	$70,000
5. Loss of support	$5,000
6. Loss of inheritance	$11,000
Zicherman (as executrix of Kole's estate)	
7. Kole's pain and suffering	$100,000

The district court ruled that plaintiffs were entitled to prejudgment interest. The court discounted the judgment back to the date of the accident at a rate of 2% per annum and awarded prejudgment interest on that amount.

II.

Where injuries occur on an international flight, the Warsaw Convention provides an exclusive cause of action. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. § 1502 note (1988); *In re Disaster at Lockerbie, Scotland on December 21, 1988*, 928

F.2d 1267, 1274-80 (2d Cir.) ("*Lockerbie I*"), *cert. denied*, 112 S. Ct. 331 (1991). However, because the Warsaw Convention is silent on the question of damages, we look to federal law to decide such issues. *Lockerbie I*, 928 F.2d at 1278-79.

KAL argues that because flight KE007 was shot down over non-territorial waters, the applicable law is DOHSA, which expressly iimits recovery to pecuniary loss. 46 U.S.C. § 762; *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-26 (1978). We disagree.

In *Lockerbie I*, we adopted the federal common law to govern causes of action under the Warsaw Convention. 928 F.2d at 1278. In *Lockerbie II*, we held that damages under the Warsaw Convention should be determined "by an examination of maritime law, which is probably the oldest body of federal common law." slip op. at 7841. While two maritime statutes – DOHSA and the Jones Act, 46 U.S.C. app. § 688 (1988) – preclude recovery for non-pecuniary loss, general maritime cases not brought under such statutory restrictions allow recovery. *Id.*, slip op. at 7841-42; *Sealand Services, Inc. v. Gaudet*, 414 U.S. 573, 585-88 (1974) (recognizing loss of society damages as remedy available under general maritime law). Looking at the language and underlying policies of the Warsaw Convention, we concluded that compensatory, non-pecuniary damages awards are appropriate under the Convention. *Lockerbie II*, slip op. at 7842-43. Accordingly, we held that under the general maritime principles of *Gaudet* and its progeny, the Warsaw Convention permits recovery for loss of society. *Id.*, slip op. at 7843.

KAL seeks to distinguish the *Lockerbie* decisions as involving an accident over dry land, whereas the present action involves an accident over water. However, as we have stressed, a uniform law should govern Warsaw Convention cases. *Lockerbie I*, 928 F.2d at 1278-79. Adopting one rule for Convention cases involving accidents over land and another for accidents over water would defeat such uniformity.

Our holding is consistent with the Congressional scheme under DOHSA, which was enacted in 1920 to create a federal cause of action for dependent survivors of seamen who died on the high seas. The Supreme Court has held that DOHSA preempts state causes of action in disputes arising from accidental deaths in non-territorial waters. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (applying DOHSA to offshore helicopter crash). In contrast to *Tallentire*, however, the present causes of action arise not under domestic law but under the Warsaw Convention, an international treaty. Unlike *Tallentire*, therefore, the question before us is not whether to apply federal or state law, but rather which federal law to apply. In order to maintain a uniform law under the Warsaw Convention, we find general maritime law, rather than DOHSA, more appropriate. *See, e.g., Domanque v. Eastern Air Lines, Inc.*, 722 F.2d 256, 262 (5th Cir. 1984) ("[T]he Warsaw Convention and Montreal Agreement were intended to act as a uniform international law which supplants each member nation's varied laws.")

Under federal maritime law, the rule is well-established that only dependents may recover damages for loss of decedent's society. *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1092 (2d Cir. 1993), *cert.*

denied, 114 S. Ct. 1050 (1994); *Anderson v. Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990); *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *but see Sutton v. Earles*, 26 F.3d 903, 914-17 (9th Cir. 1994) (allowing nondependent parents to recover loss of society damages in general maritime action). No doubt this rule denies recovery to some deserving parties; nondependent survivors may feel the loss of a loved one as keenly as dependent survivors. However, the inherent concerns of vagueness and uncertainty "necessitate[ ] that we draw a line between those who may recover for loss of society and those who may not." *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 489 U.S. 19 (1990). This distinction between dependents and nondependents has been commended "as the most rational, efficient and fair." *Miles*, 882 F.2d at 989.

In *Lockerbie II*, we extended to Warsaw Convention cases the general maritime rule limiting loss of society damages to dependents, *see* slip op. at 7844. Under that rule, Zicherman and Mahalek may recover loss of society damages only if they were dependents of Kole at the time of her death.

The test of dependency is the existence of "a legal or voluntarily created status where the contributions are made for the purpose and have the result of maintaining or helping to maintain the dependent in [her] customary standard of living." *Petition of United States*, 418 F.2d 264, 272 (1st Cir. 1969). Because Judge Motley did not explicitly instruct the jury to condition their awards for loss of society on finding such a status, we scrutinize the record

to determine what findings a jury could make on this issue.

KAL contends that, as a matter of law, Mahalek may not recover loss of society damages. The record shows that Mahalek offered no evidence to support a claim of dependency. Further, Mahalek specifically conceded on cross-examination her lack of dependence. Presented with such evidence, no jury could find Mahalek entitled to recover damages as a dependent. We reverse and vacate the award to Mahalek accordingly.

KAL further argues that the evidence submitted by Zicherman is insufficient to satisfy the test stated above. In contrast to Mahalek, Zicherman testified to generous financial assistance from Kole, including an offer to finance Zicherman's purchase of a house. Yet the record does not establish that Kole in fact financed such a purchase. Presented with such evidence, the jury could find the test of dependency satisfied, but it also could find this test not satisfied. We reverse and remand the award of loss of society damages to Zicherman, pending trial of this issue.

III.

Although federal maritime law permits dependent survivors to recover damages for loss of decedent's society, it precludes survivors from recovering additional damages for their grief or mental injury. *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978); *Gaudet*, 414 U.S. at 585-86 n.17. Nonetheless, the district court determined that this rule was inapplicable to Warsaw Convention cases. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 807 F.

Supp. at 1085-85. The court reasoned that the Warsaw Convention permits recovery for "damages sustained, and that the mental injury or grief of surviving relatives is one such species of damages.

We disagree. As we stated in *Lockerbie II*, federal maritime law supplies the measure of damages for injuries arising out of accidents governed by the Warsaw Convention. As federal maritime law does not permit surviving relatives to recover damages for mental injury or grief in addition to damages for loss of society, we reverse and vacate the awards to Zicherman and Mahalek for mental injury.

IV.

In order to recover for Kole's pre-death pain and suffering, Zicherman, as executrix, was required to provide evidence from which the jury could infer that Kole: (1) survived the missile explosions; (2) was conscious and aware for a period of time; and (3) experienced pain and suffering. To support the claim, Zicherman introduced the testimony of Foody and Elzy.

KAL contends that Zicherman did not satisfy her evidentiary burden because she offered no direct evidence on any of these points, and that the expert testimony was mere generalized testimony concerning the possible effects of a missile strike on a passenger-filled Boeing 747 flying at 35,000 feet. We disagree. Eyewitness testimony as to decedent's pain and suffering is not essential to recovery in fatal aircraft accidents, because such evidence "is difficult if not impossible to obtain." *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202, 206 (2d

Cir. 1984). Obviously, it was impossible to produce such evidence in this case. Plaintiffs satisfied their burden by providing circumstantial evidence from which "it can reasonably be inferred that the passenger underwent some suffering before the impact." *Id.* A jury which accepted Foody and Elzy's testimony could reasonably infer that Kole remained conscious for a period of up to twelve minutes after the missile strike, during which time she experienced intense, decompression-induced pain. We affirm the award to Zicherman, as executrix of Kole's estate, for Kole's pre-death conscious pain and suffering.

V.

Damages for loss of support and loss of inheritance are well-recognized maritime remedies. *See Gaudet,* 414 U.S. at 584 & n.11 ("[r]ecovery for loss of support has been universally recognized"); *Nygaard v. Peter Pan Seafoods, Inc.,* 701 F.2d 77, 80 (9th Cir. 1983) ("loss of inheritance is a pecuniary loss recoverable under DOHSA"). Loss of support consists in "all the financial contributions that the decedent would have made to his dependents had he lived." *Gaudet,* 414 U.S. at 584-85. Recovery for loss of support "requires some showing of dependence on the deceased or an *expectation of support.*" *Bergen v. F/V St. Patrick,* 816 F.2d 1345, 1350 (9th Cir. 1987), *cert. denied,* 493 U.S. 871 (1989) (emphasis added). Thus, nondependents may recover for loss of support to the extent that they "anticipated future pecuniary benefits from support of services to be rendered to them by [the] deceased." *Wahlstrom,* 4 F.3d at 1093. In the present matter, a jury could find an expectation of future monetary gifts based on

Zicherman's close relationship with Kole and Kole's previous contributions.

Loss of inheritance is properly awarded where "it is probable that the decedent, but for his death, would have accumulated property that would have been inherited by the beneficiaries." *Nygaard*, 701 F.2d at 80. In order to recover, a survivor of the decedent must prove "a reasonable expectation of pecuniary benefit." *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1093 (5th Cir. 1988). In light of Kole's letter to Zicherman, she has satisfied that burden.

The awards for loss of support and loss of inheritance are affirmed.

VI.

In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), the Supreme Court recognized that courts may discount damages to their present value to reflect the impact of inflation on future wages and prices. Traditionally, courts have used this technique in connection with awards to reflect foregone future wages or other future loss. *See, e.g., Chiarello v. Domenico Bus Services, Inc.*, 542 F.2d 883, 886 & n.4 (2d Cir. 1976). The district court discounted the entire award to the date of the accident, including that portion reflecting plaintiffs' loss between the date of the accident and the jury verdict, as a precursor to awarding prejudgment interest. We are not persuaded by the plaintiffs that the court should have discounted only that portion of the award reflecting future loss from the date of the verdict.

The calculation of prejudgment interest is a discretionary matter for the district court. *United States v. Seaboard Surety Co.*, 817 F.2d 956, 966 (2d Cir.), *cert. denied*, 484 U.S. 855 (1987). A jury verdict rendered in 1992 for an accident that occurred in 1983 may well reflect the inflationary impact of the intervening nine years; the court did not abuse its discretion. We affirm the district court's calculation of prejudgment interest.

The award to Zicherman as executrix of Kole's estate for Kole's pre-death pain and suffering, the awards to Zicherman for loss of support and loss of inheritance, and the court's calculation of prejudgment interest are affirmed. The awards to Zicherman and Mahalek for mental injury, and the award to Mahalek for loss of society, are reversed and vacated. The award to Zicherman for loss of society is reversed and remanded for proceedings not inconsistent with this opinion.

April 17, 1995

Zicherman v. KAL – Supreme Court: 94-1361

Supreme Court Decision: The petition for certiorari was granted. Limited to question 1 presented by the petition, i.e., **"MUST A SURVIVING PARENT OR SIBLING PROVE THAT THEY WERE FINANCIALLY DEPENDENT ON A DECEDENT IN ORDER TO RECOVER DAMAGES FOR LOSS OF SOCIETY UNDER THE WARSAW CONVENTION"**. Case is consolidated with #94-1477 (KAL v. Zicherman), A total of one hour is allotted.

Zicherman v. KAL – 94/1477

The petition is granted. The case is consolidated with Zicherman v. KAL. A total of one hour is allotted for oral argument.

Supreme Court, U.S.
FILED
MAY 31 1995
OFFICE OF THE CLERK

Nos. 94-1361, 94-1477

In The

Supreme Court of the United States

October Term, 1994

MARJORIE ZICHERMAN, Individually and as executrix of the estate of Muriel A.M.S. Kole, and MURIEL MAHALEK,

Petitioners/Cross-Respondents,

v.

KOREAN AIR LINES CO., LTD,

Respondent/Cross-Petitioner.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE PETITIONERS/ CROSS-RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Must a surviving parent or sibling prove that they were financially dependent on a decedent in order to recover damages for loss of society under the Warsaw Convention?

2. Does the Death on the High Seas Act prescribe the elements of damages recoverable in an international aviation accident governed by the Warsaw Convention?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 43 F.3d 18 (2d Cir. 1994), and is reproduced in the Appendix to the Petition for Writ of Certiorari at A1-A11.

The principal opinion of the District Court is reported at 807 F. Supp. 1073 (S.D.N.Y. 1992), and is reproduced in the Appendix to the Petition for Writ of Certiorari at A12-A42.

Additional opinions of the District Court, not directly related to the issues before this Court, are reported at 146 F.R.D. 61 (S.D.N.Y. 1992) and 814 F. Supp. 605 (S.D.N.Y. 1993).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 5, 1994. The Petition for Writ of Certiorari was filed on February 9, 1995, and was granted as to the first question presented for review on April 17, 1995. A Cross-Petition for Writ of Certiorari was filed on March 6, 1995, and was granted on April 17, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

This case arises under the "Warsaw Convention," known more formally as The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. §1502. The particular treaty provision involved is Article 17:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

This Court's review of the decision below will also involve the Death on the High Seas Act, 46 U.S.C. §761 *et seq.* ("DOHSA"). This statute is reproduced in relevant part in the Appendix to the Respondent's Cross-Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Korean Airlines Flight 007 strayed into Soviet airspace and was shot down on September 1, 1983. All those aboard perished. Among the passengers was Muriel A.M.S. Kole, whose mother, Muriel Mahalek ("Mahalek"), and sister, Marjorie Zicherman ("Zicherman"), are the Petitioners before this Court.

The Petitioners filed suit against Korean Air Lines Co., Ltd. ("KAL") in the Southern District of New York.

Each Petitioner sought recovery in her individual capacity, and Zicherman also sued as the personal representative of her sister's estate (Amended Complaint, reproduced in the Joint Appendix at page 28). Along with all other federal court actions arising out of the KAL tragedy, the Petitioners' case was transferred to the United States District Court for the District of Columbia for consolidated proceedings on the question of liability. *See In re Korean Air Lines Disaster of September 1, 1983*, 575 F. Supp. 342 (J.P.M.D.L. 1983).

On August 2, 1989, following a jury trial, KAL was found liable for "willful misconduct" in connection with the Flight 007 tragedy. Under Article 25 of the Warsaw Convention, KAL therefore could not invoke the $75,000.00 cap on compensatory damages that would otherwise be available. The jury also awarded $50 million in punitive damages against KAL. *See In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1477 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air II*").

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed the finding of willful misconduct, but vacated the award of punitive damages. The District of Columbia Circuit found that the Warsaw Convention was designed to compensate passengers and their survivors for any harm experienced as a result of international aviation accidents, *Korean Air II* at 1485-86, but could not be construed to permit punitive damages. *Id.* at 1485-87. After the decision of the District of Columbia Circuit, the Petitioners' case was remanded to the District Court for a damages trial.

Before a jury was empaneled to assess damages against KAL, the District Court made rulings on the elements of damages recoverable under the Warsaw Convention. The District Court ruled, *inter alia*, that the Petitioners could recover for loss of the decedent's society, and for mental injury they suffered in the aftermath of the tragedy. *See* 807 F. Supp. at 1077-78; 1084-88. The District Court did not require that the Petitioners prove they were financially dependent on the decedent in order to recover damages for loss of society.

On December 11, 1992, after hearing evidence, the jury awarded damages to the Petitioners as follows:

Mahalek	
1. Mental injury	$96,000
2. Loss of society	28,000
Zicherman	
1. Mental injury	$65,000
2. Loss of society	70,000
3. Loss of support	5,000
4. Loss of inheritance	11,000
Zicherman (as executrix)	
1. Decedent's conscious pain and suffering	$100,000

The District Court computed prejudgment interest, and entered final judgment.

KAL noticed an appeal from the District Court's final judgment, contesting all of the damages awarded on both legal and factual grounds. In an opinion dated November 3, 1994, the Second Circuit affirmed the District Court's judgment, with two important exceptions:

1. The Second Circuit ruled that damages for loss of society cannot be recovered under the Warsaw Convention unless the surviving relative was financially dependent on the decedent;

2. The Second Circuit also ruled that damages for mental injury are not recoverable under the Warsaw Convention under any circumstances.

Because the jury had not been instructed that financial dependency was a prerequisite to recovery for loss of society, the Second Circuit examined the record for evidence on the question. It found that Mahalek was, without question, not financially dependent on her daughter, and accordingly vacated all of the damages that Mahalek had been awarded. As to Zicherman, the Second Circuit found some evidence of financial dependency, and therefore remanded the case back to the District Court for a determination on this narrow question. The mental injury award to Zicherman and Mahalek was vacated.

After the Second Circuit issued its November 3 opinion, KAL petitioned for a rehearing. On December 5, 1994, the Second Circuit withdrew its initial opinion, and filed an amended opinion. In the amended opinion, the Second Circuit ruled that the jury's awards for loss of support and loss of inheritance were also subject to a financial dependency requirement. These two awards were therefore vacated, pending further proceedings in the District Court. The Second Circuit then denied KAL's request for a rehearing en banc.

On February 9, 1995, Zicherman and Mahalek filed their Petition for Writ of Certiorari in this Court. The Petitioners sought review of the Second Circuit's decision

on all of the elements of damages that had been vacated. This Court allowed the Petition in part, limiting review to the Second Circuit's decision imposing a financial dependency requirement on loss of society damages. By simultaneously granting KAL's Cross-Petition for a Writ of Certiorari, this Court has also agreed to consider whether DOHSA applies to preclude any recovery for loss of society in the circumstances of the KAL disaster.

SUMMARY OF THE ARGUMENT

Under Article 17 of the Warsaw Convention, KAL is liable for any "damage sustained" in the aftermath of the Flight 007 tragedy. There can be no question that Mahalek and Zicherman have sustained damage of the most acute kind due to Muriel Kole's death, damage that has nothing to do with their financial condition. The plain meaning of the Warsaw Convention therefore supports the District Court's award for loss of society.

Any doubt about the meaning of the phrase "damage sustained" in Article 17 is eliminated when the history and purpose of the Warsaw Convention is examined. The drafters of the Convention understood that loss of society would be recoverable in the event of a passenger's death. Indeed, to deter willful misconduct by air carriers, it is essential that a broad range of compensatory damages be available under Article 17.

Although the Second Circuit misconstrued the phrase "damage sustained" in Article 17, it wisely rejected KAL's claim that DOHSA applies to the facts of this case. The Warsaw Convention contains a broad, substantive rule on

the elements of recoverable damages in the case of international aviation accidents. There is no reason to engraft DOHSA or any other body of law onto Article 17.

Even if this Court were to decide that the Warsaw Convention was silent on the elements of damages recoverable under Article 17, recovery for loss of society should be permitted under well-established federal damages law. Financial dependency should be disregarded, because it is cruel and irrational to suggest that the loss of a loved one is not compensable if the surviving relative happened to work hard and pay her own bills.

ARGUMENT

I. THE WARSAW CONVENTION PERMITS RECOVERY FOR LOSS OF SOCIETY DAMAGES WITHOUT REGARD TO FINANCIAL DEPENDENCY

A. The Text of Article 17 Supports the Award for Loss of Society Made by the District Court

1. The plain meaning of "damage" encompasses loss of society experienced by parents and siblings

Article 17 of the Warsaw Convention sets out an elegantly simple rule on damages. It provides that an air carrier such as KAL "shall be liable for damage sustained in the event of the death or wounding of a passenger . . . " 49 Stat. 3018. To apply this rule to the facts of the case below, the appropriate starting point is the language of the Convention itself, particularly the words "damage sustained." *See generally Santovincenzo v. Egan,*

284 U.S. 30, 40 (1931) (words used in a treaty are to be taken in their ordinary meaning); *Restatement (Third) of the Law of Foreign Relations* §325 (1987); *see also Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (treaties are the supreme law of the land, and their terms override any inconsistent laws).

The ordinary understanding of the term "damage" encompasses loss, detriment or injury. *See III Oxford English Dictionary* 14 (1978 edition); *Black's Law Dictionary* 351 (5th ed. 1979); *Webster's Ninth New Collegiate Dictionary* 323. As an intransitive verb, "damage" suggests "to suffer." *See The American Heritage Dictionary of the English Language* 333 (1973 edition). Nothing about the ordinary meaning of "damage" restricts its usage to financial loss.

Against this background, there is no question that Mahalek and Zicherman sustained "damage" as a result of Muriel Kole's death. The loss and suffering they experienced were profound; there is no more acute sort of damage than the unexpected, tragic loss of a beloved family member. Based on the plain meaning of Article 17, KAL is liable for the loss of society that the Petitioners established in the District Court.

It is regrettable that the Court below recognized loss of society as an element of damages under Article 17, but then elected to restrict recovery to financially dependent survivors. Implicitly, the Second Circuit ruled that loss of a loved one is not "damage" in the absence of financial dependency. This is an absurd result, and it is entirely contrary to the ordinary understanding of the word "damage." Financial dependency has nothing to do with the profound emotional loss experienced with the tragic death of a close relative. The testimony of Mrs. Mahalek

in the District Court illustrates this obvious point: she worked hard her entire life so that she would *not* be financially dependent on her children, but the damage she sustained when her daughter perished was real (JA 76-88). The award made to her, and to Zicherman, should not have been taken away.

2. The French legal meaning of "damage sustained" encompasses loss of society

The Warsaw Convention was drafted in French by continental jurists. As a result, the French legal meaning of the word "damage" ("dommage" in the original French text) is of considerable importance in evaluating the decision below. *See Air France v. Saks,* 470 U.S. 392, 399 (1985), *citing Reed v. Wiser,* 555 F.2d 1079 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977). In this case, the French legal meaning of "dommage" coincides with the ordinary English understanding of the term.

In French civil law, there are two categories of damage: "dommage matérial" (pecuniary loss) and "dommage moral" (non-pecuniary losses including emotional distress). *See* Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lésion Corporelle,* 25 Tex. Int'l. L.J. 127, 136 (1990), *citing* Nicholas, *French Law of Contracts,* 221-22 (1982) and DeVries, *Civil Law and The Anglo-American Lawyer* 330 (1975). French law has thus recognized loss of society as a component of "dommage" since well before the turn of the century. Speiser *et al., Recovery for Wrongful Death & Injury,* §3:55 at 256, n. 11 (3d ed. 1992); Miller, *Liability in International Air Transport* 112 (1977), *citing*

Mazeaud, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* 416-17 (5th ed. 1957). By using the general term "dommage" rather than the more limited term "dommage matérial," the drafters of the Warsaw Convention expressed an intent to provide for loss of society damages.[1]

The Courts of Appeals for both the District of Columbia Circuit and the Second Circuit have recognized that the French legal meaning of "dommage" encompasses loss of society. *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 37 F.3d 804, 829 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) (*"Lockerbie II"*); *Korean Air II*, 932 F.2d at 1487; *see also Diaz-Lugo v. American Airlines, Inc.*, 686 F. Supp. 373, 376 (D.P.R. 1988) (under Article 17, loss of consortium constitutes "damage sustained"). This Court has explicitly left the question open. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 540 n. 7 (1991). The *Floyd* opinion does recognize, however, that French law provides for recovery of *any* damages that can be proven, including loss of society. *Id.* at 539-40 and n. 7.

Importantly, nothing about the French legal meaning of "dommage" supports the imposition of a financial dependency requirement. *See generally* Speiser *et al.*, *supra* §3:55 at 258, n. 17 (French civil code places no limitations on recovery according to the nature of the damages). It is therefore inconsistent for the Courts of Appeals to recognize the authority of French civil law on the one hand, *see e.g., In re Air Disaster at Lockerbie, Scotland on December 21,*

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[1] The dictionary definition of "dommage" includes "hurt, detriment, loss, harm." *Cassell's French Dictionary* 266 (Macmillan ed. 1982).

1988, 928 F.2d 1267, 1281 (2d Cir. 1991) ("*Lockerbie I*"), but to then impose an irrational financial dependency requirement on the other. Both Mahalek and Zicherman sustained "damage" within the French law meaning of the term.

B. The Structure and Purpose of the Warsaw Convention Preclude Undue Restrictions on Compensatory Damages

1. The Convention contains a cap on damages to protect the economic interests of air carriers

When the Warsaw Convention was drafted in the 1920s, the airline industry was still quite young. One of the purposes of the Convention was to protect the fledgling industry from liability losses that can be a particularly grave threat where air travel is involved. *See* Lowenfeld *et al.*, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499 (1967), *citing* remarks of M. Giannini, chairman of the Warsaw Convention working group, in *II Conférence International de Droit Privé Aérien*, 4-12 Octobre 1929, at 135.

The drafters of the Convention had at least two options available to them to limit the aviation industry's liability. First, they could have restricted the damages available under Article 17 to pecuniary loss ("dommage matérial"). Such pecuniary loss wrongful death statutes were in existence in other nations at the time. *See e.g.*, Lord Campbell's Act, 9 & 10 Vict. ch. 93 (England). Second, the drafters could have allowed for unrestricted compensatory damages ("dommage"), subject to a fixed

cap on the monetary amount of damages that could be awarded.

Of course, the drafters of the Warsaw Convention chose the damages cap as the means to protect the economic interest of international air carriers. Warsaw Convention, Article 25, 49 Stat. 3020. This cap currently stands at $75,000.00. *See Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol,* approved by C.A.B. Order No. E-23680, *reprinted at* 49 U.S.C. App. §1592 note (1976). This is the *only* restriction on compensatory damages found in the Warsaw Convention, and it represents a carefully deliberated and negotiated choice among the parties to the treaty.

Today, in the 1990s, a restrictive interpretation of the term "dommage" would be even more inappropriate than it would have been in the 1920s. A liability cap of $75,000.00 per passenger is a tremendous economic advantage for the airline industry under current economic conditions. The damages cap protects air carriers in all cases except for the rare tragedy where willful misconduct has been found. It would be tremendously unfair to rewrite Article 17 by inserting the term "matérial" or any other qualifier after the term "dommage," thereby affording air carriers an unintended double layer of liability protection. *See generally Chan v. Korean Air Lines, Ltd.,* 490 U.S. 122, 135 (1989) (courts must not amend treaties by judicially inserting new clauses or terms), *citing The Amiable Isabella,* 6 Wheat. 1, 71 (1821).

It should be noted that the United States government has repeatedly expressed concerns about restrictions on compensatory damages under the Warsaw Convention

since it entered into force in 1934. In a conference at the Hague in 1955, the chairman of the United States delegation told the delegates that the United States "was interested in maximum recoveries for the injured parties or their survivors." Lowenfeld *et al., supra* at 507. A similar position was expressed at a Montreal conference in 1966. *Id.* at 564; *see also* statement of N.E. Halaby, Administrator, Federal Aviation Agency, in *Hearings on the Hague Protocol to the Warsaw Convention,* United States Senate Committee on Foreign Relations, May 26-27, 1965, pp. 18-19 (U.S. Government Printing Office, 1965). Of course, these concerns were expressed in a different context, namely, the debate over raising the monetary amount of the damages cap under Article 25. Nonetheless, the position taken by the United States after 1934 illustrates the tension created when an industry is afforded the extraordinary protection of a damages cap, tension that the Warsaw Convention addressed by allowing a full range of compensatory "dommage" under Article 17.

2. Full compensatory damages are vital to deter willful misconduct

Under Article 25 of the Warsaw Convention, an air carrier's liability is limited to $75,000.00 per passenger even if the carrier has been negligent or grossly negligent. The cap is lifted only if the carrier has committed willful misconduct. Understandably, the drafters of the Convention wanted to deter egregious mistakes by an airline that are easily preventable. *See generally In re Inflight Explosion on Transworld Airlines, Inc. Aircraft Approaching Athens, Greece on April 2, 1986; Ospina v.*

Transworld Airlines, 778 F. Supp. 625, 631 (E.D.N.Y. 1991) ("*Ospina*") (deterrence is a generally recognized goal of tort law). The more that compensatory damages under Article 17 are unduly restricted, the less will be the deterrent force of the Warsaw Convention.

The need for full compensatory damages to deter willful misconduct is especially critical because punitive damages are not available under the Warsaw Convention. *See Korean Air II*, 932 F.2d at 1485-86. A full range of compensatory damages is thus the only tool available to maximize the deterrent value of the Convention. Indeed, in disallowing punitive damages, the Second Circuit in *Lockerbie I* relied in part on the full range of compensatory damages available under French law:

> There is nothing in French law prohibiting compensation for any particular kind of damage, be it mental injury, suffering due to the death of a member of the family, or pain and suffering due to a physical injury. Provided the damage is *certain* and *direct*, all forms of damage can be compensated to their full extent.

932 F.2d at 1487, *citing* Miller, *Liability in International Air Transport* 112 (1977) (emphasis in original). Thus, the unavailability of punitive damages must be balanced by a full range of compensatory damages in order for the deterrent effect of the Warsaw Convention to work.

II. THE DISTRICT COURT'S AWARD FOR LOSS OF SOCIETY UNDER THE WARSAW CONVENTION IS CONSISTENT WITH FEDERAL AND STATE DAMAGE LAW

A. The Death on the High Seas Act Does Not Apply to the Facts of This Case

1. Article 17 of the Warsaw Convention is not an empty vessel

Throughout this litigation, KAL has taken the position that the words "damage sustained" in Article 17 of the Warsaw Convention have no substantive content. In other words, KAL believes that Article 17 is silent on the elements that make up "dommage," and that the Convention therefore expressly defers to the internal law of each contracting state to determine the precise elements of recoverable damages.

To support its position, KAL relies primarily on Article 24 of the Convention. This Article provides:

Article 24

> 1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> 2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020. Contrary to KAL's position, the last clause of this Article refers only to procedural questions, not

substantive ones. In particular, this provision defers to local law on the issue of who has standing to sue. Lowenfeld *et al., supra* at 517. By referring to the "respective" rights of potential plaintiffs, the Article also defers to local law on the issue of dividing up the proceeds of a recovery under Article 17.

It is easy to understand why the drafters of the Warsaw Convention did not want to tackle procedural questions such as standing to sue. Even among the 50 states, wrongful death statutes employ a variety of procedural schemes to enforce the rights of survivors, and to divide up proceeds; similar differences exist between nations. It would have been a monumental task to reconcile these diverse procedures in an international convention.

Importantly, however, Article 24 does *not* say that the substantive elements of damages recoverable under Article 17 are left open. The term "dommage" has its own substantive content by virtue of its ordinary meaning, and its French legal meaning. As discussed above, "dommage" means any loss or injury sustained, be it pecuniary or emotional. No reference to local law is required to effectuate Article 17.

It must be remembered that uniformity among nations was a central goal of the Warsaw Convention, along with the desire to promote the aviation industry. Lowenfeld *et al., supra* at 498; *see also Trans World Airlines Inc. v Franklin Mint Corp.*, 466 U.S. 243, 256 (1984) (Convention's framers sought to include international, not parochial, rules of substantive law, free from the control of any one country). Obviously, deferring to local law to

determine the elements of damages recoverable under Article 17 would frustrate this purpose, and subject air carriers to a bewildering array of substantive damage law.[2] This is why Article 17 uses a term, "dommage," that has its own substantive content.

2. The Death on the High Seas Act would be a poor filler even if Article 17 was an empty vessel

DOHSA was enacted in 1920, fourteen years before the Warsaw Convention became effective in the United States, and seven years before Charles Lindbergh crossed the Atlantic. It applied to deaths "caused by wrongful act, neglect, or default occurring on the high seas . . . " 46 U.S.C. §761. International commercial aviation was almost unknown at the time, and Congress certainly did not consider the effect that DOHSA might have on aviation accidents when it was debated and enacted.

Of course, DOHSA has been broadly construed since its enactment. Aviation deaths from domestic flights occurring on the high seas have been held to be subject to its provisions, despite the fact that aviation is only marginally related to traditional maritime activity. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 270-71 and n. 20 (1972). However, DOHSA has never been applied by this court to an *international* aviation accident

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[2] By contrast, deferring to local procedural law is much less onerous. The total exposure faced by air carriers in the aftermath of an aviation accident is unaffected by differences in procedure such as the proper parties to bring suit, and the respective rights of claimants.

that is directly governed by the Warsaw Convention, and most lower courts have refused to engraft DOHSA onto Article 17 of the Convention. *See Lockerbie II*, 37 F.3d at 829; *In re Korean Air Lines Disaster of September 1, 1983; Bowden v. Korean Air Lines Co., Ltd.*, 814 F. Supp. 592, 597-98 (E.D. Mich. 1993); *Ospina*, 778 F. Supp. at 636 (noting that DOHSA does not apply to preclude a survival cause of action under the Warsaw Convention); *In re Air Crash Disaster Near Honolulu, Hawaii, on February 24, 1989*, 783 F. Supp. 1261, 1265 (N.D. Cal. 1992) (DOHSA might govern the pecuniary loss components of a Warsaw Convention case, but DOHSA does not *limit* the types of damages recoverable under Article 17).

There are two good reasons for the lower courts' reluctance to rewrite Article 17 by inserting the provisions of DOHSA. First, DOHSA cannot possibly apply where an international flight crashes over land, or over territorial waters. *See* 46 U.S.C. §761. In such a case, courts would have to find some other body of law to determine the damages recoverable under Article 17. Such inconsistency, an arbitrary function of geography, is anathema to the Warsaw Convention's goal of uniformity, as the Second Circuit recognized in its decision below. 43 F.3d at 21, *citing Lockerbie I*, 928 F.2d at 1278-79.

The second reason to reject KAL's position is that DOHSA is a very restrictive statute. It allows for pecuniary damages only, such that in many instances there is no recovery at all in the case of wrongful death. As discussed above, such undue restrictions on compensatory damages are unwarranted when the Warsaw Convention applies, because the liability exposure of air carriers is *already* greatly restricted by the damages cap of Article

25. The Court below also hinted at this fundamental conflict:

> We cannot reconcile DOHSA's limitation of damages to pecuniary loss with the "aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention."

43 F.3d at 22, *citing Lockerbie II*. This rationale is all the more compelling in light of the $75,000.00 cap that protects air carriers in most instances. DOHSA has no place in the Warsaw Convention's unique and comprehensive scheme for regulating international air transportation.

B. Federal Common Law Supports the Loss of Society Awards Made in the District Court

The Second Circuit elected to look beyond the plain meaning of "damage sustained," and relied on federal common law to determine the elements of damages recoverable under the Warsaw Convention. This approach is unnecessary, because the loss of Muriel Kole's society was, without question, "damage sustained" in every sense of that phrase. However, the judgment of the District Court should have been affirmed even under federal common law.

1. Loss of society is a well-established feature of federal damages law

Damages for loss of society are available under federal common law. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583 (1974) (federal common law allows recovery

for loss of society for death of longshoreman in territorial waters); *see also Berry v. City of Muskogee, Oklahoma*, 900 F.2d 1489, 1507 (10th Cir. 1990) (decided under 42 U.S.C. §1983 and federal common law of torts); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1251-53 (7th Cir. 1984) (same).[3] This Court has recognized the "grave harm" caused to survivors when they are deprived of the "broad range of mutual benefits *each family member* receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection." *Gaudet*, 414 U.S. at 585 (emphasis added). In its opinion below, the Second Circuit correctly noted that loss of society is a recognized remedy under federal common law.

In fashioning federal common law, courts can and should look to state law as one source of guidance. *Gaudet*, 414 U.S. at 587. The majority of the fifty states permit recovery for loss of society in cases of wrongful death. 3 Minzer *et al., Damages in Tort Actions*, §22.43 [1][a](1991); Speiser, *supra* at §3.50. The most compelling rationale for this majority rule is that "[t]he destruction of the intangible elements of a family relationship, including love, comfort, and companionship, is generally an inherent and real consequence of the wrongful death of a parent, child, spouse or sibling." 3 Minzer, *supra* at §22.43[1][a], *citing Elliott v. Willis*, 89 Ill. App. 3d 1144, 412

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[3] Federal common law has been developed in only limited areas, particularly admiralty and civil rights. *See Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 626 n. 5 (3d Cir. 1994).

N.E.2d 638 (1980), *also citing* cases from other jurisdictions permitting siblings and parents to recover for loss of society.

It is true that, where DOHSA applies, loss of society is not available under federal law. *See, e.g., Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618, 623-24 (1978). Similarly, for a Jones Act case involving the death of a seaman, loss of society is unavailable; the Jones Act, like DOHSA, limits recovery to pecuniary damages. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33 (1990). Neither *Miles* nor *Higgenbotham* is applicable here, however, because this is a Warsaw Convention case outside the reach of both DOHSA and the Jones Act. *See generally American Export Lines, Inc. v. Alvez*, 447 U.S. 274, 281-82 (1980) (reaffirming that loss of society is available under federal common law where DOHSA and the Jones Act are not directly applicable).[4]

In the past, this Court and some lower courts have expressed concern that *Gaudet* strayed too far from a perceived congressional scheme to regulate maritime wrongful death cases. *See, e.g., Calhoun*, 40 F.3d at 636 (*Gaudet* may represent the apex of plaintiff's rights in admiralty actions). However, decisions limiting the reach of *Gaudet* are based entirely on the proposition that two 1920 statutes – DOHSA and the Jones Act – express a congressional intent to limit recovery to pecuniary losses for maritime deaths. *Miles*, 498 U.S. at 24. This proposition is untrue in a Warsaw Convention case; the Convention entered into force as a comprehensive treaty 14 years

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[4] The *Alvez* decision noted that DOHSA and the Jones Act were hastily enacted, and should not unduly influence the development of federal common law. 446 U.S. at 283.

after DOHSA and the Jones Act were enacted. Those two statutes therefore have nothing to say about a Warsaw Convention case, and the common law principles announced in *Gaudet* should retain their vitality where the Warsaw Convention is concerned.

2. Parents and siblings may recover for loss of society under federal common law without a showing of financial dependency

Federal damages law, when not constrained by specific statutes, has always provided full compensation for injuries. *See, e.g., Moragne v. States Marine Lines*, 398 U.S. 375, 387 (1970) ("it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules"). This is especially true where, as in this case, deterrence is a central goal of the liability system. *See Berry*, 900 F.2d at 1507 (federal remedy must make available sufficient damages to serve the deterrent function central to the purpose of 42 U.S.C. §1983). By limiting loss of society damages to financially dependent relatives, the decision below ran afoul of this general principal.

In *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), the Court of Appeals upheld an award for loss of society to non-dependent parents. The Ninth Circuit found nothing in *Gaudet* that would require a financial dependency test, and thus rejected such a test as "unnecessary distinction." 26 F.3d at 917. As the Ninth Circuit observed, even those courts that have imposed a financial dependency requirement have questioned its logic. *Id.* at 917, n. 18, *citing*

Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1092 (2d Cir. 1993).

For cases such as this one, where *Gaudet* still retains vitality, this Court should adopt the Ninth Circuit's view on financial dependency. The crass limitation on loss of society damages imposed by the opinion below sends a terrible message about the law to society at large. How seriously can the public take a legal system that denied recovery to Mrs. Mahalek because she worked her entire life to support herself, but would have rewarded her if she had received monthly checks from her daughter? On this point, the Second Circuit's sheepish statement that "no doubt this rule denies recovery to some deserving parties," 43 F.3d at 22, is an awful understatement.

To overcome the illogic and cruelty of a financial dependency requirement, the Second Circuit relied entirely upon the following proposition:

> . . . the inherent concerns of vagueness and uncertainty "necessitate[ ] that we draw a line between those who may recover for loss of society and those who may not."

43 F.3d at 22, *Citing Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989). It may be true that a line needs to be drawn; the Court below offered no real support for this assertion, empirical or otherwise. If true, however, the line drawn by the District Court, permitting "close family members" to recover for loss of society, at least has some rational basis. Loss of society generally tends to be less acute among more distant relatives of a decedent; it is not a perfect correlation, but it is vastly superior to financial dependency as a test of lost companionship.

This Court has an opportunity to reaffirm that federal common law is logical and sensible. By adopting *Sutton*, and rejecting the financial dependency test espoused by other circuits, this Court can make it clear that hard work and financial self-sufficiency will not result in a loss of legal rights.

CONCLUSION

Mahalek and Zicherman both sustained damage due to KAL's willful misconduct. They lost the love and companionship of Muriel Kole, and the District Court properly compensated them for this damage. The judgment of the Court of Appeals should be vacated, and the judgment of the District Court awarding damages for loss of society should be affirmed.

The Petitioners/
Cross-Respondents,
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Nos. 94-1361, 94-1477

SUPREME COURT, U.S.
FILED
JUL 3 1996
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, Individually and as executrix of the estate of Muriel A.M.S. Kole, and MURIEL MAHALEK,

Petitioners/Cross-Respondents,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent/Cross-Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT/CROSS-PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, pursuant to the general maritime law principles of *Gaudet*,[1] and in light of *Higginbotham*[2] and *Miles*[3], non-pecuniary damages for loss of society are recoverable for a death occurring on the high seas within the meaning of DOHSA[4] during the course of international air transportation within the meaning of the Warsaw Convention[5]? (Question from Cross-Petition in No. 94-1477).

II. Whether a financially nondependent mother and sister of a decedent may recover damages for loss of society under general maritime law, for a death on the high seas within the meaning of DOHSA, during the course of international transportation by air within the meaning of the Warsaw Convention? (Question I from Petition in No. 94-1361).

---

1 *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).

2 *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

3 *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

4 Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*

5 Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502.

LIST OF ALL PARTIES AND RULE 29.1 LISTING

A. Respondent/Cross-Petitioner

The Respondent/Cross-Petitioner is KOREAN AIR LINES CO., LTD. (hereinafter "KAL") who was the defendant-appellant/cross-appellee in the Court of Appeals. KAL is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd.
Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

B. Petitioners/Cross-Respondents

The Petitioners/Cross-Respondents are Marjorie Zicherman and Muriel Mahalek, who were the plaintiffs-appellees/cross-appellants in the Court of Appeals.

C. Amici

The following briefs *amici curiae* have been filed in support of the position of Petitioners/Cross-Respondents:

1. Brief *Amicus Curiae* of the Plaintiffs' Committee in *In re Air Crash Disaster at Lockerbie, Scotland*, MDL 799 (E.D.N.Y) ("*Lockerbie Amicus Brief*").

2. Brief *Amici Curiae* of Philomena Dooley, *et al.*, plaintiffs in *In re Korean Air Lines Disaster*, MDL 565 (D.D.C.) ("*KAL Amicus Brief*").

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 43 F.3d 18 (2d Cir. 1994) and is reproduced in the Appendix to the Petition for Writ of Certiorari filed by Petitioners/Cross-Respondents on February 9, 1995 at A1-11.[1] The opinions of the district court are officially reported at 807 F. Supp. 1073 (S.D.N.Y. 1992) (A12-42), 146 F.R.D. 61 (S.D.N.Y. 1992) and 814 F. Supp. 605 (S.D.N.Y. 1993).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 5, 1994. CA1. A timely Petition for Rehearing filed by Korean Air Lines Co., Ltd. ("KAL") was denied by Order, also dated December 5, 1994.[2] Petitioners/Cross-Respondents ("Plaintiffs") filed a Petition for a Writ of Certiorari on March 7, 1995, which the Court granted on April 7, 1995, limited to the first question presented by the Petition. KAL filed a Cross-Petition for a Writ of Certiorari on February 9, 1995, which the Court granted on April 7, 1995. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

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[1] References preceded by "A" refer to pages in the Appendix to the Petition for Writ of Certiorari filed by the Petitioners/Cross-Respondents. References preceded by "CA" refer to pages in the Appendix to the Cross-Petition for a Writ of Certiorari filed by KAL. References preceded by "J.A." refer to pages in the Joint Appendix.

[2] The Court of Appeals originally issued an opinion on November 3, 1994. *See Zicherman v. Korean Air Lines*, Nos. 93-7490, 93-7546, 1994 Westlaw 606516 (2d Cir. Nov. 3, 1994)(J.A. 104). Following the filing by KAL of a Petition for Rehearing and Suggestion for Rehearing *In Banc*, the November 3, 1994 opinion was "withdrawn" and an "amended" opinion and judgment were filed on December 5, 1994, wherein the Court of Appeals also denied KAL's Petition for Rehearing. *See* Judgment and Order dated December 5, 1994 at CA1. KAL's Suggestion for Rehearing *In Banc* was denied by Order dated January 20, 1995. *See* CA3.

STATUTORY AND TREATY PROVISIONS INVOLVED

The applicable statute is the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* ("DOHSA"). The applicable treaty is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502 ("Warsaw Convention"). The pertinent provisions are set forth in the Appendix hereto at App. 1a-4a.

STATEMENT OF THE CASE

A. Nature of the Case. This litigation arises from the crash in international waters of KAL flight KE007 on September 1, 1983, when Soviet military aircraft shot down flight KE007 while en route to Seoul, South Korea from Anchorage, Alaska. All 269 persons on board the aircraft were killed. The case previously was before the Court on another question. *See Chan v. Korean Air Lines*, 490 U.S. 122 (1989). The present controversy involves the question whether nonpecuniary damages for loss of society are recoverable under the Warsaw Convention for the death of a passenger in an aircraft accident on the high seas within the meaning of DOHSA.

The Plaintiffs are the sister (Marjorie Zicherman) and the mother (Muriel Mahalek) of Muriel Kole ("decedent")[3], one of the passengers killed in the crash of KAL flight KE007. They seek damages under the Warsaw Convention and DOHSA individually and on behalf of the estate of the decedent. J.A. 29-30.

B. The Warsaw Convention and DOHSA. It is not disputed that this action is governed by the Warsaw Convention,

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[3] Decedent's husband, Michael Kole, instituted two separate actions to recover damages for the death of decedent in the United States District Court for the Northern District of California. *Kole v. Korean Air Lines*, Nos. 83-4038, 83-4381 (N.D. Cal.). Michael Kole was not a party to the proceedings below.

as supplemented by the Montreal Agreement.[4] The decedent was traveling on KAL flight KE007 pursuant to a passenger ticket providing for international transportation within the meaning of Article 1 of the Convention. Although the Warsaw Convention has been held to create a cause of action for wrongful death,[5] the Convention does not set forth the types of recoverable "compensatory damages"[6] or the proper claimants in the event of the death of a passenger. These questions intentionally were left by the drafters of the Convention for determination by the national law of each contracting party to the Convention. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) ("*Korean Air II*").

The death of Muriel Kole ("decedent") occurred on the high seas within the meaning and statutory scope of DOHSA. 46 U.S.C. App. § 761; J.A. 29. DOHSA is the national law of the United States which is applicable to and prescribes the recoverable damages and proper claimants for all deaths occurring on the high seas. 46 U.S.C. App. § 761 (App. 3a). DOHSA specifically restricts recoverable damages to pecuniary losses only and does not permit the recovery of nonpecuniary dam-

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[4] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Agreement 18900, *reprinted in* note following 49 U.S.C. App. § 1502 (approved by CAB Order E-23680, May 13, 1966, 31 Fed. Reg. 7302). The Warsaw Convention, together with the Montreal Agreement, serves to limit an air carrier's liability for a passenger death to the sum of $75,000, unless the death was proximately caused by the "wilful misconduct" of the air carrier within the meaning of Article 25 of the Convention, in which event the monetary limit on recoverable damages is not available to the carrier.

[5] *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400 (9th Cir. 1983); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

[6] The phrase "compensatory damages" refers to damages other than purely mental anguish damages of a passenger and punitive damages, recovery of which is precluded by Article 17. *See Eastern Airlines v. Floyd*, 499 U.S. 530 (1991); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485-90 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

ages for loss of society. *See* 46 U.S.C. App. § 762 (App. 3a); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30-33 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622-25 (1978).

C. The Damage Trial in the District Court. The liability of KAL was determined in the context of multidistrict litigation proceedings in the District Court for the District of Columbia when a jury found that the destruction of KAL flight KE007 was proximately caused by the "wilful misconduct" of the flight crew of KAL. *See Korean Air II*, 932 F.2d at 1476-79.

Prior to the subsequent damage trial in the district court, KAL moved, *inter alia*, for a determination that DOHSA, as the law directly applicable to all deaths occurring on the high seas, (1) prescribes the recoverable damages and the proper claimants and (2) prohibits the recovery of nonpecuniary damages for loss of society. A3. The district court denied KAL's motion and held that Plaintiffs were entitled to recover nonpecuniary damages for loss of society. A3. At the conclusion of the ensuing damage trial, the jury awarded damages for loss of society in the sum of $28,000 to the mother and $70,000 to the sister of the decedent.[7] A4. KAL appealed and Plaintiffs cross-appealed.

D. The Decision of the Court of Appeals. The Court of Appeals, recognizing that the Warsaw Convention leaves to national law the determination of the types of recoverable compensatory damages, concluded that it had to decide "which federal law to apply" in determining whether nonpecuniary damages for loss of society are recoverable for a DOHSA death occurring during Warsaw Convention trans-

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[7] The jury also awarded damages in the amount of $161,000 for survivor's grief to Plaintiffs, $14,000 for loss of support and inheritance to the sister and $100,000 for the pre-death pain and suffering of the decedent. A4. The award of grief damages was set aside by the court below as a matter of law. A8-9. The award for loss of support and inheritance was remanded for further proceedings. A7-8. These awards are not involved in the questions under review.

portation. A5-6. The Court of Appeals held that loss of society damages are recoverable in this case "under the general maritime law principles of *Gaudet* and its progeny". A6.[8] The court applied *Gaudet* because it considered itself bound by its earlier decision in *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 37 F.3d 804 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) ("*Lockerbie II*"), a case involving Warsaw Convention death actions arising from an aircraft accident on land, as to which DOHSA did not apply. The *Lockerbie II* decision was itself premised on an earlier decision of the same court in *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1274-80 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"), which held that the Warsaw Convention provides the "exclusive" cause of action for death and that "federal common law" governs the extent of the damages recoverable pursuant to this "exclusive" cause of action.

The court in *Lockerbie II*, in fashioning a federal damage rule for Warsaw Convention cases, found general maritime law to be the best source of federal common law. *Lockerbie II*, 37 F.3d at 828-29. The *Lockerbie II* court adopted *Gaudet* as representative of general maritime law and, therefore, allowed for the recovery of loss of society damages in Warsaw Convention cases for deaths that occur on land. *Id.*

Although the death in this case, unlike the deaths in *Lockerbie II*, occurred on the high seas within the meaning of DOHSA, the court below rejected DOHSA as the applicable national law, and instead extended *Gaudet* to the high seas to allow for the recovery of loss of society damages. A5-6. To achieve this result, the court reasoned:

1. *Lockerbie I* stressed that uniformity should govern the Warsaw Convention cause of action (A5-6);

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[8] *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), a non-DOHSA case, held that loss of society damages were recoverable under general maritime law based on the doctrine of unseaworthiness by the financially dependent wife of a longshoreman killed in the territorial waters of the United States. *Id.* at 585-90.

2. the adoption by the court of one damage rule for deaths occurring on land (general maritime law/*Gaudet*) and another damage rule for deaths occurring on the high seas (DOHSA), would defeat this desire for uniformity in the types of recoverable damages in Warsaw Convention cases (A5-6); and

3. DOHSA's pecuniary loss provisions cannot be reconciled with the " 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,' . . . including non-pecuniary loss" (A6).

In holding that loss of society damages are recoverable for a death on the high seas generally, the court below also held that a prerequisite to such an award is that the claimant must be financially dependent upon the decedent at the time of death. A7-8. As a result, the court set aside the damage award to the decedent's mother, for lack of financial dependency, and remanded the award to the decedent's sister for a factual determination as to her financial dependency at the time of decedent's death. A7-8, A10.

SUMMARY OF ARGUMENT

This action is governed by the Warsaw Convention and DOHSA. The principal question before the Court is whether the Plaintiffs are entitled to recover loss of society damages for the death of the decedent.

The Warsaw Convention does not delineate the types of damages recoverable in the event of an accident causing the death of a passenger during the course of Convention transportation. The drafters of the Convention left that subject for determination by the applicable national law of the contracting parties to the Convention.

In the United States, the directly applicable national law in this case is DOHSA, since the decedent was killed as a result of an aircraft crash on the high seas. DOHSA precludes the recovery of loss of society damages. The Court of Appeals

disregarded DOHSA and held that loss of society damages are recoverable in this case pursuant to the general maritime law principles of *Gaudet*, 414 U.S. at 573, where the Court allowed the recovery of loss of society damages in a non-DOHSA case. In this, the Court of Appeals erred.

The reason offered by the court below for rejecting DOHSA and following *Gaudet*, was its desire for a uniform rule as to recoverable damages in all Warsaw Convention cases, whether the death occurs on land or on the high seas. In light of the Second Circuit's earlier adoption of *Gaudet* for land based accidents in *Lockerbie II*, the court below viewed DOHSA as an obstacle to the court's desire for a uniform rule and, therefore, rejected DOHSA, in favor of *Gaudet*. This was contrary to the directions of the Court that a judicial desire for uniformity cannot override DOHSA where it applies. Moreover, because DOHSA addresses the very issue which the drafters of the Convention left to the national law of the contracting parties, the Convention and DOHSA are not in conflict, but actually complement each other.

The court below also erred in adopting *Gaudet* as representative of a general maritime law "rule" allowing the recovery of loss of society damages. A5-6. The court below ignored all subsequent limitations placed on *Gaudet* by the decisions of the Court and the prevailing rule that general maritime law cannot supplement the damages recoverable under DOHSA.

If the Court desires to adopt a uniform national rule of damages applicable to all Warsaw Convention cases, as urged by Plaintiffs and *Amici*, and as desired by the court below, then DOHSA should be the primary guide because (1) DOHSA must be applied to all aircraft accidents on the high seas and (2) although there is no directly applicable federal statute for deaths in aircraft accidents on land, all federal wrongful death statutes, like DOHSA, allow for the recovery of pecuniary damages only. Thus, the application of DOHSA directly in this case and by analogy to land accidents, will create national uniformity and would be consistent with all Congressional

enactments and policies concerning federal based wrongful death damage recovery.

ARGUMENT

I

THE TYPES OF COMPENSATORY DAMAGES RECOVERABLE IN A PASSENGER DEATH CASE GOVERNED BY THE WARSAW CONVENTION ARE TO BE DETERMINED BY REFERENCE TO THE NATIONAL LAW OF EACH CONTRACTING PARTY

The Court of Appeals, the *Amici* for Petitioners herein and the Plaintiffs in the court below, agree that the Warsaw Convention leaves the issue of the types of recoverable compensatory damages for the death of a passenger for determination by the national law of each contracting party to the Convention.[9] However, Plaintiffs now argue here that it is improper to look to the domestic law of the United States for the determination of this question, because loss of society damages are recoverable solely by reference to Article 17 of the Warsaw Convention and French damage law. Brief for Petitioners/Cross-Respondents at 7-11, 16-17 ("Plaintiffs' Brief"). This new argument of Plaintiffs runs directly contrary to the language, structure and drafting history of the Convention and to the interpretation given the Convention by the contracting parties.

The relevant provisions of the Warsaw Convention concerning the liability of the air carrier for compensatory damages are Articles 17 and 24. To determine whether the Warsaw Convention and these provisions themselves define the types of recoverable compensatory damages or defer to the national law of the contracting parties, the Court directs

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[9] *Zicherman*, 43 F.3d at 21 (A5); *Lockerbie Amicus Brief* at 10; *KAL Amicus Brief* at 17; *Plaintiffs' Second Circuit Brief*, Nos. 93-7490, 93-7546 at 5-7, 10 (2d Cir. Aug. 31, 1993) ("To properly interpret the phrase 'damage sustained' in Article 17, this Court must look to federal common law.")

that we should begin with the text of the treaty and the context in which the written words are used. *Eastern Airlines v. Floyd*, 499 U.S. 530, 534 (1991). As treaties are construed more liberally than private agreements, we also are to look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties. *Id.* at 535. Finally, the purposes of the Convention must be upheld and we are to give meaningful effect to the expectations of the contracting parties. *Id.* at 535, 546.

The conclusion that the types of recoverable compensatory damages in an action governed by the Warsaw Convention are to be determined by reference to the national law of each party to the Convention is consistent with the plain meaning of the language of Articles 17 and 24, the drafting history of the Convention, the goals of the Convention, the expectations and conduct of the parties to the Convention and precedent in American and foreign courts.

A. The Background and Goals of the Warsaw Convention

The Warsaw Convention was the result of two international conferences, the first held in Paris in 1925 and the second in Warsaw in 1929, and extensive preparatory work by *Comité International Technique d'Experts Juridiques Aériens* (CITEJA), which had the primary responsibility for preparing the draft convention and reports. *Chan v. Korean Air Lines*, 490 U.S. 122, 139 (1989).[10] The Warsaw Convention had two primary goals: first, and most important, to establish uniform liability rules and limit the liability of air carriers[11], and sec-

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[10] For a discussion of the goals and drafting history of the Convention, *see* Lowenfeld & Mendelson, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967); Ide, *History and Accomplishments of C.I.T.E.J.A.*, 3 J. Air. L. & Com. 27 (1932).

[11] Before the Warsaw Convention was adopted, carriers in civil law countries were permitted to contractually disclaim any liability for passenger injury or death. *Second International Conference on Private Aeronautical Law, Oct. 4-12, 1929, Warsaw Convention Minutes* at 42, 47 (R. Horner & D. Legrez transl. 1975) ("*1929 Warsaw Minutes*").

ond, to establish uniform rules governing documentation, such as airline tickets and air waybills, and a uniform procedure for addressing claims arising out of international air transportation. *Floyd*, 499 U.S. at 546.

Although the Convention addresses numerous matters relating to air carrier liability, many rules were determined to be unsuitable for uniform treatment by the Convention and intentionally were left to be resolved according to the national laws of the contracting parties. *See Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); *see also Benjamins*, 572 F.2d at 922 (Van Graafeiland, J., dissenting).[12] One of the matters expressly left for resolution by resort to national law, pursuant to Article 24 of the Convention, was the types of the wrongful death damages recoverable for an Article 17 passenger death. *See infra*. at 11-21; H. Drion, *Limitation of Liabilities in International Air Law* at ¶ 111 (Martinus Nijhoff 1954) ("*Drion*"); D. Goedhuis, *National Airlegislations and the Warsaw Convention* at 269 (Martinus Nijhoff 1937) ("*Goedhuis*"); Note, *Beneficiaries' Claims After the Death of a Passenger as a Result of an Airplane Crash*, 12 Ars Aequi 17 (Nov. 1959) (in Dutch) ("*Ars Aequi*"); *cf. 1929 Warsaw Minutes* at 176, 188 (addressing scope of Convention and proposal of Czechoslovakia to refer to domestic law matters the Convention does not address).

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[12] *See, e.g.*, Article 21 (contributory negligence), Article 24(2) (standing and damages), Article 25 (standards for wilful misconduct), Article 28(2) (procedural questions) and Article 29 (limitation on time to sue).

B. The Plain Language and Drafting History of the Convention Evidence the Intent that the National Law of Each Contracting Party Is to Determine the Types of Compensatory Damages Recoverable for Passenger Death

1. Article 17 Establishes the Air Carrier's Liability for "Damage Sustained" But Leaves to National Law the Types of Recoverable Compensatory Damages

Article 17 of the Warsaw Convention provides:

> The carrier shall be liable for *damage sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (App. 1a) (emphasis added).[13]

The phrase "damage sustained" does not and has never been held to define the types of recoverable compensatory damages.[14] Article 17 simply creates the air carrier's liability for "damage sustained" once the conditions for Article 17 liability are fulfilled.[15] The determination of the types of recov-

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[13] The official French text of Article 17 provides:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou cours de toutes opérations d'embarquement et de débarquement.

49 Stat. 3005.

[14] *Korean Air II*, 932 F.2d at 1490; *Lockerbie I*, 928 F.2d at 1274-80; *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987); *Rosman v. Trans World Airlines*, 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974).

[15] *See Floyd*, 499 U.S. at 532-33, 535-36; *Air France v. Saks*, 470 U.S. 392, 394 (1985); *Korean Air II*, 932 F.2d at 1490; *see also* Report of Secretary of State Hull, *reprinted in* 1934 U.S. Av. R. 239, 243 (1934).

erable compensatory damages for the death of a passenger is left to the national law of the contracting parties pursuant to Article 24(2). *Korean Air II*, 932 F.2d at 1488.

Plaintiffs argue that resort to national (or domestic) law is not proper because the phrase "damage sustained" (*dommage survenu*), as used in Article 17, allows for the recovery of loss of society damages by virtue of its ordinary meaning and its French legal meaning. Plaintiffs' Brief at 7-11, 16. Plaintiffs ignore the fact that the meaning of "damage" in 1929 varied greatly from country to country. *Drion*, at ¶ 112. In England and in the United States at that time, the term "damage" as used in death statutes was interpreted to mean only pecuniary loss.[16] Other Warsaw participants (*e.g.*, Austria, Denmark, Germany, Hungary, Netherlands, Soviet Union, Yugoslavia), similarly limited damages for death to pecuniary loss. *See* 11 *Int'l Encyclopedia of Comparative Law: Torts ch. 9*, at §§ 9-36, 9-40, 9-41, 9-42 pp. 15-18 (A. Tunc ed. 1972) ("*Int'l Encyclopedia*"); *Drion* at ¶ 112 n.112; *see also* B. Markesinis, *A Comparative Introduction to the German Law of Tort*, at 541 (Claredon Press 1986); *Introduction to Dutch Law for Foreign Lawyers* at 102-03 (2d ed., J. Chorus, P. Grever E. Hondius, A. Koekkoek eds., Kluwer 1993); V. Gsovski, *Soviet Civil Law: Private Rights and Their Background Under the Soviet Regime* at 538-54 (V. Gsovski transl., Univ. of Mich. Law School 1948); P. Haanappel, *The Right to Sue in Death Cases under the Warsaw Convention*, 6 Air. L. 66, 72-76 (1981) ("*Haanappel*"); *see also Floyd*, 499 U.S. at 544 n. 10.

While in French damage law the term "damage" (*dommage*) may encompass the concept of "*dommage matérial*" (pecuniary damage) and "*dommage moral*" (nonpecuniary damage),

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[16] The Courts in England interpreted the word "damages" in the Fatal Accidents Act 1846 (the Lord Campbell's Act) as providing only for pecuniary loss. *Salmond's Law of Torts*, at 429-33 (7th ed. 1928, W.T.S. Stallybrass); *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913). A similar meaning was given to the word "damage" as it appears in federal death statutes, such as the Federal Employers' Liability Act ("FELA"), 45 U.S.C. App. § 59. *Vreeland*, 227 U.S. at 71 (word "damage" in FELA allows only for pecuniary loss or damage).

there is no suggestion in the Convention or in its drafting history that the drafters, by using the term "*dommage*" in the original French text, rather than "*dommage matérial*", intended to provide for the recovery of loss of society damages[17] or to have French damage law define the types of recoverable compensatory damages.[18] Plaintiffs' Brief at 10.

The fact that the national law of many of the Convention drafters, from both common law and civil law countries, did not allow for the recovery of nonpecuniary damages, belies the "assumption" drawn by Plaintiffs that the drafters had a specific intent to apply French damage law, rather than their own national law, for determining the types of recoverable damages in a Warsaw Convention case. *See supra* at 12; *Floyd*, 499 U.S. at 544 n.10. Contrary to Plaintiffs' assertions (Plaintiffs' Brief at 10), had the drafters intended that French damage law govern the types of recoverable damages in a Warsaw Convention case, it would have been a simple matter to have made a specific reference to French damage law in the Convention. *See Floyd*, 499 U.S. at 545 (if pure psychic damages were intended to be recoverable as "bodily injury", "the drafters most likely would have felt compelled to make an unequivocal reference" to such damages). At a minimum, it would have been hotly debated by delegates of those nations which did not recognize nonpecuniary damages for death. *See Lockerbie I*, 928 F.2d at 1284 (if drafters contemplated recov-

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[17] In arguing that French civil law allowed for the recovery of loss of society damages, Plaintiffs improperly confuse grief and mental suffering damages with loss of society damages. Plaintiffs' Brief at 8-11. Loss of society damages do not compensate family members for their mental suffering or grief, but for their loss of love, affection and companionship. *See Gaudet*, 414 U.S. at 585 n.17. The authority cited by Plaintiffs tends only to establish that French law allowed nonpecuniary damages for the grief and mental suffering of family members. Plaintiffs' Brief at 9-10 *citing authorities*.

[18] Plaintiffs' reliance on *Korean Air II*, *Floyd*, and *Lockerbie II*, is misplaced. *Korean Air II* and *Floyd* did not address the recovery of loss of society damages and *Lockerbie II* relied on the same inconclusive authority as Plaintiffs in concluding that French law allowed for the recovery of loss of society damages.

ery of punitive damages, it would have been "hotly" debated since most drafting states did not allow such damages).

The rationale of Plaintiffs, in effect, would incorporate into the Convention the entire body of French damage law, as it existed in 1929. This rationale flies in the face of the structure and wording of the Convention as well as the intent of the parties.[19]

Plaintiffs do not refer to any drafting history or authority to support their interpretation of Article 17, because none exists. The only recorded discussion during the 1929 Warsaw Conference that relates to the term "damage sustained" concerned the scope of the application of the Convention to a carrier's liability under Article 17. *See 1929 Warsaw Minutes* at 67-84, 166-67. This discussion reveals that the phrase "damage sustained", as it appeared in the original draft of Article 17 (draft Article 21), had a temporal meaning. Article 21 of the draft convention, prepared by CITEJA and submitted to a Second International Conference that convened in Warsaw in 1929, provided in relevant part:

> The carrier shall be liable for *damage sustained during carriage*:
>
> (a) in the case of death, wounding, or any other bodily injury suffered by a traveler;
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> * * *

1929 Warsaw Minutes at 264-265 (emphasis added).

During the second reading of Article 21, the delegate from the Netherlands raised the question whether Article 21, as worded, would apply to the death of a passenger who is

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[19] It was recognized in the opening session of the 1929 Warsaw Conference that the drafters did not want to force "acceptance of one legal system or another." *1929 Warsaw Minutes* at 19. *Cf. Floyd*, 499 U.S. at 540 (declining to displace drafters' understanding that term "bodily injury" did not include psychic injury by reference to a meaning abstracted from French civil law, especially where other nations did not recognize actions for psychic injury).

injured during carriage but dies one or two days after the carriage has ended. *1929 Warsaw Minutes* at 166-67 (is the death "considered as *being sustained* during the carriage. . . "). The drafters considered that a death which occurs during carriage is the same as if the death occurs some days after the end of the carriage. *Id.* at 166-67. To ensure clarity, the phrase "occurred during carriage" was eliminated from the draft. *Id.* at 167. This was the only discussion at the Warsaw Conference touching upon the phrase "damage sustained".

Plaintiffs ignore that all courts in the United States and commentators agree that Article 17 does not define the types of recoverable compensatory damages for wrongful death and that this issue was left for determination by reference to the national law of each contracting party. *See Zicherman*, 43 F.3d at 21 (A5); *Lockerbie II*, 37 F.3d at 828; *Korean Air II*, 932 F.2d at 1488; *accord Lockerbie I*, 928 F.2d at 1283 ("Convention leaves the measure of damages to the internal law of parties to the Convention"); *Harris*, 820 F.2d at 1002 ("damages are to be measured according to the internal law of a party to the Convention"); *Benjamins*, 572 F.2d at 921 (Van Graafeiland, J. dissenting) ("Article 17 . . . does not specify. . . what types of damages may be recovered"); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 855 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965) (damages left to "internal law"); *see also* G. Calkins, *The Cause of Action Under the Warsaw Convention (Part II)*, 26 J. Air. L. & Com. 323, 339 (1959) ("*Calkins*"); *Haanappel* at 66; R. Mankiewicz, *The Liability Regime of the International Air Carrier*, at 155-56, 189 (Kluwer 1981) ("*Mankiewicz*"); N. Matte, *Treatise on Air-Aeronautical Law* at 382 (McGill Univ. 1981); G. Miller, *Liability in International Air Transport* at 125 (Kluwer 1977) ("*G. Miller*").

That the drafters intended that the types of recoverable compensatory damages be determined by reference to the national law of each contracting party, also is clear from the language and discussions leading to the adoption of Article 24.

2. Article 24(2) Directs the Courts to National Law to Ascertain the Types of Recoverable Compensatory Damages for Passenger Death

In confining their argument to the scope of Article 17 and the presumed meaning and intent of the phrase "damage sustained", Plaintiffs invite the Court to ignore the effect of Article 24 of the Convention on the questions presented. Article 24 provides:

> (1) In the cases covered by Articles 18 [baggage] and 19 [delay] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.*

49 Stat. 3020 (App. 1a) (emphasis added).[20]

The plain meaning and the intent of Article 24 is clear. "[P]ursuant to Article 24 the proper 'measure' of damages recoverable under Article 17 is left to the domestic law of the contracting states." *Korean Air II*, 932 F.2d at 1488; *see Lockerbie I*, 928 F.2d at 1274-80, 1283; *Harris*, 820 F.2d at 1002; *Mexico City*, 708 F.2d at 415; *Drion* at ¶ 111.

Plaintiffs argue that the phrase in Article 24(2)—"who are the persons who have the right to bring suit and what are their respective rights"—defers to domestic law only for resolution

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[20] The official French text of Article 24 provides:

> (1) Dans les cas prévus aux articles 18 et 19 toute action responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.
>
> (2) Dans les cas prévus à l'article 17, s'appliquent également les dispostions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs.

49 Stat. 3006.

of the "procedural" questions of who has standing to bring suit and the division of the proceeds, and does not defer to domestic law for resolution, the "substantive" question of what types of damages are recoverable for an Article 17 passenger death. Plaintiffs' Brief at 15-16. Plaintiffs offer no support for such an interpretation of Article 24(2). The argument also fails to recognize that the "right to bring suit" phrase, which refers to the class of persons entitled to claim damages, is related directly to the very types of damages that those persons can recover. *See Korean Air II*, 932 F.2d at 1488.[21]

Even if the narrow interpretation of Article 24(2) urged by Plaintiffs were to be accepted, so that "respective rights" means only how the damages are to be divided, a court first would be required to determine the types of damages properly recoverable before the recovered damages can be divided. Thus, the "respective rights" phrase necessarily must include a determination of the types of damages the persons suing may recover. *See Korean Air II*, 932 F.2d at 1488; *Harris*, 820 F.2d at 1002; *Drion* at ¶ 111.

The drafting history of Article 24(2) confirms that the right to sue for damages for the death of a passenger, and the respective rights of those suing, were intertwined with the types of recoverable compensatory damages. The same problems encountered by the delegates in addressing the question of who can sue arose in attempting to address the question of what damages can be recovered—it was considered impossible to set in a single formula the various legal concepts of the national laws of the various parties to the Convention. *Korean Air II*, 932 F.2d at 1488-89. In fact, all attempts to insert a conflict of law damage rule in the Convention failed, so that even the question of which law shall apply was left to be gov-

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[21] One commentator has observed that the drafters of the Convention considered the right to sue in death cases as a question of substantive law and not merely a procedural question. *Haanappel* at 67. Moreover, Article 28(2) specifically addresses procedural questions and defers their resolution to domestic law. App. 2a.

erned by the national law of the parties. Thus, "the Convention provides neither for a substantive rule of law nor for a choice of law rule. . . . for the meaning of the word 'damage' in Article 17. . . ." *Haanappel* at 66.[22]

In the draft of the Warsaw Convention presented to the Third Session of CITEJA in May 1928, the provision (draft Article 27) that is now Article 24, provided:

> In the event of death of the holder of the right, any action in liability, however founded, can be exercised . . . by the persons to whom this action belongs according to the national law of the deceased or, in the absence hereof [sic], according to the law of his last domicile.

CITEJA Report, 3d Session, May 1928, at 114, *quoted in Lockerbie I*, 928 F.2d at 1284.

The CITEJA Report of May 15, 1928 stated:

> In the event of the death of the party legally representing the estate, any action, of whatever nature whatsoever, may be brought by those persons to whom such action pertains in accordance with the law of the nation of the deceased or, in the absence thereof, in accordance with that of his last domicile. But such action can only be exercised under the conditions and within the limitations which are provided for by the convention.
>
> These provisions have the specific purpose of impeding persons who claim to have the right to bring actions outside of the convention; all of them have to adhere to the limitations of this convention.

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[22] A similar problem was encountered in the drafting of other international liability conventions. For example, neither the Treaty of Rome 1933 (drafted by the same individuals in CITEJA and during the same period of time as the Warsaw Convention), which relates to injuries caused to third-parties on the ground by falling objects from the air, nor the Bern Convention 1924, which relates to international rail transportation, contains provisions specifying the types of damages recoverable. The issue is left to the national laws of each contracting nation. *Drion* at ¶¶ 111-112; *Ars Aequi* at 18-19.

> The question has been posed *in this regard as to whether one might define the category of damages which is susceptible to compensation.*
>
> Although this question has appeared to be a very interesting one, a satisfactory solution has not been possible to be found prior to knowing exactly the bodies of statutory law of the various countries. *It is understood that the question is to be studied subsequently when the point is clarified on determining which persons, according to the laws of the various nations, have the right to exercise an action* against the carrier.

Report of Second Commission by Henry de Vos, CITEJA Reporter (May 15, 1928), in CITEJA Report, 3d Session at 106 (May 1928) (emphasis added) (App. 8a-9a).

The final result of CITEJA's studies "led the drafters to abandon the choice of law rule favoring the decedent's domicile, thus leaving both the choice of law and the question of the rights of legal claimants to 'general principles of private international law and to the internal legislation of States.' " *Lockerbie I*, 928 F.2d at 1285.

The choice of law provision in the draft Article 27 was deleted and the Article was renumbered Article 24. *1929 Warsaw Minutes* at 265.

The CITEJA Report which accompanied the 1929 draft, stated:

> The question was asked of knowing if one could determine who the persons upon whom the action devolves in the case of death are, and what are the damages subject to reparation. It was not possible to find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independantly [sic] from the present Convention.

1929 Warsaw Minutes at 255 (Report of the Third Session of CITEJA by Henry de Vos (Sept. 15 1928)).

At the 1929 Warsaw Conference, the German delegation submitted a proposal that the Convention expressly leave the issues of standing and what are the rights of the claimants in death cases to the domestic law of each contracting party. *1929 Warsaw Minutes* at 58, 169, 211-214, 289-90 (proposal of German delegation). The proposal was accepted and included in Article 24(2) without debate. *Id.*

Article 24 as adopted has been interpreted by all courts and commentators to mean that "the proper 'measure' of damages recoverable under Article 17 is left to the domestic law of the contracting states." *Korean Air II*, 932 F.2d at 1488; *Lockerbie I*, 928 F.2d at 1274-83; *Harris*, 820 F.2d at 1002; *Mexico City*, 708 F.2d at 415. *see Drion* at ¶¶ 111-112; *Goedhuis* at 269-71; *Ars Aequi* at 17; *Mankiewicz* at 155-56; *G. Miller* at 115-17, 125.

The post-1929 conduct of the contracting parties confirms that the types of recoverable compensatory damages in a Convention case are to be determined by the national laws of each contracting party.[23] For example, Australia, Canada, England, Germany and the Netherlands adopted domestic legislation implementing the Convention and setting forth the types of damages recoverable in a Convention case, standing to sue and/or the proper beneficiaries of the wrongful death action. *See Haanappel*, 6 Air L. at 70-76; Giemulla, Schmid & Ehlers, *Warsaw Convention* 33-40 (Kluwer 1992); P. Martin, *et al.*, *Shawcross & Beaumont: Air Law*, ¶ VII (71) (4th ed. 1993); Sand, *Limitations of Liability and Passenger Accident Compensation Under the Warsaw Convention*, 11 Am. J. Comp. L. 21, 30 (1962). The Court in *Dame Surprenant v. Air Canada*, 1973 C.A. Quebec 107, 117-18, 126-27 (Ct. App. Quebec 1973), interpreting the Convention to defer to local law the issue of recoverable damages, rejected an argument that "dommage" in Article 17 allows for nonpecuniary damages without reference to Quebec law, which precludes such

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[23] The Court previously has noted the relevance of "post-1929 'conduct' and 'interpretation' of the signatories" in determining the intended meaning of the Convention. *Floyd*, 499 U.S. at 546-47.

damages. *Cf. Preston v. Hunting Air Transport*, 1956 U.S. Av. Cas. 1 (Q.B. 1956)(England) ("damage sustained" allows loss of parental nurture under English law).

Plaintiffs assert that deferring to domestic law to determine the elements of recoverable damages under the Convention would "frustrate" the Convention's "goal" of uniformity. Plaintiffs' Brief at 16-17. However, the language of the Convention and the drafting history detailed above, demonstrate that the drafters, unable to find an acceptable uniform standard for the types of recoverable compensatory damages, due to the differing prevailing national damage rules, intentionally left the matter for determination by reference to the national law of each contracting party. *Korean Air II*, 932 F.2d at 1488-89; *Drion* at ¶¶ 111-112; *see supra* at 16-20. Professor Mankiewicz, a leading Warsaw Convention scholar, explains that the reason the Convention does not contain a uniform rule as to recoverable damages "is evident":

> In 1929 many countries, particularly amongst the common law countries, had no rules on the survival of contractual rights, and wrongful death statutes, where they existed, varied greatly in scope and substance, i.e. with respect to the "persons who have the right to bring suit" and "their respective rights". In a matter so intimately intertwined with the national particularities of tort and family law, any attempt at unification of these rules was bound to lead nowhere.

R. Mankiewicz, *The Gap in Article 24(2) of the Warsaw Convention* at 88 in *Mensch und Luftfahrt*, Erinnerungs-schrift Guldimann (Bern 1981); *see G. Miller*, at 125 ("unification of the rules governing air carriage achieved by the Convention" does not extend to types of recoverable damages).

The overall Convention goal of uniformity as to liability rules does not and never was contemplated by the parties to include the types of recoverable damages in an action governed by the Convention.

The plain language of Articles 17 and 24(2) of the Convention, read together, leaves the determination of the types of recoverable "compensatory damages" to national law. The issue then becomes, simply, what types of compensatory damages are recoverable under the applicable national law of the contracting parties. This is a domestic choice of law issue for each party to the Convention. *See, e.g., Harris*, 820 F.2d at 1002; *Mertens*, 341 F.2d at 855; *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 275 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965); *G. Miller* at 115-17, 125. If the applicable national law allows for, or precludes, the recovery of certain types of compensatory damages, such damages are recoverable or are not recoverable solely on the basis of the relevant national law and not upon the basis of the phrase "damage sustained" as used in Article 17.

II

THE DEATH ON THE HIGH SEAS ACT IS THE NATIONAL LAW PRESCRIBING THE TYPES OF RECOVERABLE DAMAGES IN THIS CASE

The Court of Appeals below, having correctly concluded that the Warsaw Convention defers the issue of recoverable damages to national law, then was faced with the issue of "which federal law to apply" to determine whether loss of society damages are recoverable for an Article 17 passenger death occurring on the high seas.[24] A6.

However, the court below erred in its choice of federal law for an Article 17 death occurring on the high seas and then compounded the error by misinterpreting the federal law that it chose to apply.

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[24] All Parties and *Amici* agree that the relevant internal substantive law to be applied in the United States to the issues not addressed by the Convention is federal and not state law, because it would make little sense to adopt state law in giving meaning to the Convention. *Lockerbie I*, 928 F.2d at 1274, 1279. *Cf. Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (state law not applicable to high seas).

A. DOHSA Is the Applicable National Law and Precludes Recovery of Loss of Society Damages

1. DOHSA Applies to Aircraft Accidents

Where a fatal accident occurs on the high seas, more than a marine league from the shore of any State or Territory of the United States, the directly applicable federal wrongful death statute is DOHSA. 46 U.S.C. App. § 761 (App. 3a); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 209, 232 (1986); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 n.18, 625 (1978).

Courts have recognized for over 50 years that if the location of an aircraft accident satisfies the requirements of § 761 of DOHSA, then DOHSA applies to a death action brought as a result of the accident. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 271-72 & n.20 (1972); *Miller v. United States*, 725 F.2d 1311, 1314-25 (11th Cir.), *cert. denied*, 469 U.S. 821 (1984); *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 635 (8th Cir. 1972); *D'Aleman v. Pan American World Airways*, 259 F.2d 493, 494-95 (2d Cir. 1958); *Choy v. Pan American Airways*, 1 Av. Cas. (CCH) 947, 1942 A.M.C. 483 (S.D.N.Y. 1941).[25]

The Court in *Executive Jet*, 409 U.S. at 263-64, recognized the applicability of DOHSA to aircraft accidents on the high seas:

> Since *Choy*, many actions for wrongful death arising out of aircraft crashes into the high seas beyond one marine league from shore have been brought under the Death on the High Seas Act, and federal jurisdiction has consistently been sustained in those cases. [footnote cit-

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[25] Moreover, § 761 refers to the site of an accident on the high seas, not where the death occurs or where the wrongful act causing the accident may have originated. *Gaudet*, 414 U.S. at 599-600 (Powell, J., dissenting on other grounds); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348 (9th Cir. 1987), *modified on other grounds*, 866 F.2d 318 (9th Cir.), *cert. denied*, 493 U.S. 871 (1989); *Lacey v. L.W. Wiggins Airways, Inc.*, 95 F. Supp. 916, 918 (D. Mass. 1951).

> ing cases omitted] Indeed, it may be considered as settled that [DOHSA] gives the federal admiralty courts jurisdiction of such wrongful-death actions.

Id. at 263-64. *See Tallentire*, 477 U.S. at 218-19 (even without DOHSA, "admiralty jurisdiction is appropriately invoked here under traditional principles because the [helicopter] accident occurred on the high seas and in furtherance of . . . a traditional maritime activity. . . . the ferrying of passengers. . . ."); *Higginbotham*, 436 U.S. at 623 (applying DOHSA to helicopter crash on high seas).

It is not disputed in this case that the Article 17 accident resulting in the death of the decedent occurred on the high seas within the scope of DOHSA. J.A. 29.[26]

2. DOHSA Precludes the Recovery of Loss of Society Damages

Section 762 of DOHSA expressly limits the recovery of damages to "fair and just compensation for the *pecuniary loss* sustained." App. 3a. The Court has interpreted this provision to impose an absolute prohibition on the recovery of nonpecuniary damages for loss of society for any death occurring on the high seas, regardless of whether the action is based on state law or general maritime law. *Tallentire*, 477 U.S. at 209; *Higginbotham*, 436 U.S. at 623-625.

B. The Decision Of the Court Below Allowing the Recovery of Loss of Society Damages Is Contrary to DOHSA and General Maritime Law

Although the death of the decedent in this case occurred on the high seas within the meaning of DOHSA, the court below rejected DOHSA in allowing the recovery of loss of society

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[26] Moreover, KAL flight KE007 "was engaged in a function traditionally performed by water-borne vessels: the ferrying of passengers" from the mainland over the high seas to another land mass. *Tallentire*, 477 U.S. at 219. Travel from Anchorage to Korea "would, of necessity, have to be accomplished by ship but for the introduction of the airplane into this forum." *Miller v. United States*, 725 F.2d at 1315.

damages. A5-6. The court did not do this because it considered that it was required to do so by the Convention. Rather, the overriding reason was the desire of the court below to adopt the same rule for Warsaw Convention aircraft accidents occurring on the high seas as was adopted by the same court earlier for Warsaw Convention aircraft accidents occurring on land. In *Lockerbie II*, the Court of Appeals had extended the general maritime law principles of *Gaudet* to land-based Warsaw Convention passenger death actions to allow for the recovery of loss of society damages. The court below appears to have viewed DOHSA as an obstacle to its desired goal of uniformity and, therefore, simply rejected DOHSA in favor of the general maritime law principles of *Gaudet*. In this the court below erred.

The court below premised its rejection of DOHSA on the finding of two "conflicts": (1) that "[a]dopting one rule for Convention cases involving accidents over land and another for accidents over water would defeat" the judicial desire for a uniform damage law to govern all Warsaw Convention cases, and (2) DOHSA's pecuniary loss provisions cannot be reconciled with the " 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,'. . . including non-pecuniary loss." A5-6. Plaintiffs argue that, on the basis of these judicially perceived conflicts, DOHSA is inapplicable in this case. Plaintiffs' Brief at 17-19.

1. There Is No Conflict Between the Warsaw Convention and DOHSA

Prior to the KAL litigation, no court had found that the damage provisions of DOHSA conflict with the Warsaw Convention.[27] Indeed, prior to the general acceptance by the courts that Article 17 of the Convention creates a wrongful

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[27] *See In re Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 783 F. Supp. 1261, 1265 (N.D. Cal. 1992); *Park v. Korean Air Lines*, 24 Av. Cas. (CCH) 17,253, 17,258 (S.D.N.Y. 1992) (Buchwald, M.J.); *see also Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965).

death cause of action, DOHSA was considered as the basis upon which to seek recovery for a passenger death occurring on the high seas during Warsaw Convention transportation.[28]

While in the event of a *direct* conflict between a statute and a treaty[29], the later in time prevails, it prevails only to the extent necessary to resolve the conflict. *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). This is because a court should never interpret one as preempting the other, but rather "will always endeavor to construe them so as to give effect to both." *Whitney*, 124 U.S. at 194; *see Frost v. Wenie*, 157 U.S. 46, 58-89 (1895).

In this case, there is no conflict between DOHSA and the Warsaw Convention. DOHSA and the Convention complement each other. DOHSA addresses the very issue which the drafters of the Convention left to be resolved by the national law of the contracting parties. The conflicts found by the court below and asserted by Plaintiffs simply do not exist and are themselves in conflict with the goals of the Convention and the expectations of the contracting parties.

a. The Desire of the Court Below for Uniformity Cannot Override DOHSA

The first conflict created by the court below is not a conflict between DOHSA and the Convention, but represents a conflict between DOHSA and the court's desire for uniformity in recoverable damages in all Warsaw Convention cases.

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[28] *See Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *aff'g*, 154 F. Supp. 162 (S.D.N.Y. 1956), *cert. denied*, 355 U.S. 907 (1957); *Pardonnet v. Flying Tiger Line, Inc.*, 233 F. Supp. 683 (N.D. Ill. 1964); *Notarian v. Trans World Airlines, Inc.*, 244 F. Supp. 874, 875-76 (W.D. Pa. 1965); *Wyman v. Pan American World Airways*, 181 Misc. 963, 43 N.Y.S.2d 420 (N.Y. Sup. Ct. 1943), *aff'd*, 267 A.D. 947, 48 N.Y.S.2d 459 (1st Dep't), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944); *see also G. Calkins*, 26 J. Air L. & Com. at 340-41; *Haanappel*, 6 Air L. at 69 n.23 & 76 n.95.

[29] Treaties and statutes are of equal force and effect. U.S. Const. art. VI, cl. 2; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

However, the desire of the court below for such uniformity is not a Convention goal and cannot serve as a basis to override DOHSA. *See Higginbotham*, 436 U.S. at 624; *Park v. Korean Air Lines*, 24 Av. Cas. (CCH) 17,253, 17,258 n.12 (S.D.N.Y. 1992).

The Court rejected a similar desire for judicial uniformity as an acceptable rationale for overriding DOHSA in *Higginbotham*. As to the difference between the recovery of loss of society damages for a death on the high seas (not allowed by DOHSA) and in territorial waters (allowed by the general maritime law principles of *Gaudet*)[30], the Court stated:

> We recognize today, as we did in *Moragne*, the value of uniformity, but a ruling that DOHSA governs wrongful-death recoveries on the high seas poses only a minor threat to uniformity of maritime law . . . . As *Moragne* itself implied, *DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy*, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right. It is true that the measures of damages in coastal waters will differ from the high seas, but *even if this difference proves to be significant, a desire for uniformity cannot override the statute.*

Higginbotham, 436 U.S. at 624 (emphasis added and footnotes omitted). *Accord Miles*, 498 U.S. at 33; *Tallentire*, 477 U.S. at 233; *Park*, 24 Av. Cas. (CCH) 17,253 at 17,258 n.12.

In *Tallentire*, the Court held that the pecuniary remedies of DOHSA were exclusive and preempted a state wrongful death statute permitting the recovery of nonpecuniary damages for loss of society. 477 U.S. at 230-33. The Court reaffirmed the preclusive effect of DOHSA and again rejected the argument

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[30] The Court did not consider its holding to pose a significant threat to uniformity because loss of society damages were viewed as purely "symbolic" and not the primary element of damage. *See Higginbotham*, 436 U.S. at 624-25 & n. 20.

that a desire for uniformity may serve as the basis for allowing loss of society damages in disregard of DOHSA. 477 U.S. at 233.

The first conflict created by the court below, a judicial desire for uniformity, was resolved by the Court in favor of DOHSA in *Miles*, *Tallentire* and *Higginbotham*. The court below chose a different path in disregard of DOHSA and the teachings of the Court. In this, the court below erred and should be reversed.

b. The Unavailability of Loss of Society Damages Under National Law Does Not Conflict With Any Goal of the Warsaw Convention

The second conflict created by the court below was a perceived conflict between DOHSA's pecuniary loss provision and the " 'aim of the Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention,'. . . including non-pecuniary loss." A6 (quoting *Lockerbie II*, 37 F.3d at 829 (citing *Korean Air II*, 932 F.2d at 1486-87 and *Lockerbie I*, 928 F.2d at 1281)).[31]

In creating this "conflict", the court below made two assumptions: (1) that the aim of the Convention was to provide recovery of "full" compensatory damages, including non-pecuniary losses and (2) that loss of society damages are a necessary element of a "full" recovery. Both assumptions are unfounded.[32]

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[31] This rationale was not a part of the original opinion issued by the court below on November 3, 1994, which allowed loss of society damages, but was included in the amended opinion issued on December 5, 1994, evidently in response to KAL's argument in its rehearing petition that the court was required to give effect both to DOHSA and the Convention to the extent that they do not conflict. *See Zicherman*, 1994 Westlaw 606516 at 3 (J.A. 104).

[32] The court below cited as support *Lockerbie II*, 37 F.3d at 829, which in turn cited *Lockerbie I*, 928 F.2d at 1281 and *Korean Air II*, 932 F.2d at 1486-87. A6. These decisions did not recognize any such goal in the Convention. *Lockerbie II* merely stated that the Convention *itself*

The Court has recognized that "the primary purpose of the contracting parties to the Convention [was]: *limiting the liability of air carriers* in order to foster the growth of the fledgling commercial aviation industry. . . ." *Floyd*, 499 U.S. at 546 (emphasis added); *see Trans World Air Lines v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984). The Court in *Floyd* stated:

> Whatever may be the current view among Convention signatories, *in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers*, ...

Floyd, 499 U.S. at 546 (emphasis added).[33]

A national law precluding the recovery of loss of society damages (DOHSA) cannot be said to conflict with any goal of the Convention, when the drafters expressly left the determination of the types of recoverable damages to the national law of each contracting party.

Under DOHSA and other federal wrongful death statutes, the recovery of pecuniary damages is the intended full recovery. The fact that certain elements of damage may not be recognized under the laws of a particular nation or state, does not render the recovery incomplete—the prescribed recoverable damage is the "full" or "complete" recovery under the applicable national law. Thus, there is nothing inherent in the preclusion of loss of society damages by DOHSA that con-

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places no restrictions on the *types* of "compensatory damages" and, therefore, "compensatory damages" recognized by the applicable national law of the contracting party may be recovered. The referenced portion of *Korean Air II* and *Lockerbie I* relates to a discussion that the Article 17 phrase "damage sustained" is compensatory and not punitive in nature, and thus precludes the recovery of punitive damages in a Warsaw Convention case.

[33] Plaintiffs' argument that the drafters made a deliberate choice to limit liability by imposition of a cap on recoverable damages in Article 22, rather than to "limit" the types of recoverable damages, is meritless and is not supported by the drafting history of the Convention. Plaintiffs' Brief at 11-12.

flicts with any goal, term or provision of the Convention or the intent and expectations of the Parties.[34]

None of the "conflicts" created and perceived by the court below exist. None can justify the rejection of DOHSA as the applicable national law on recoverable damages in this case.

2. Neither *Gaudet* Nor Federal Common Law Preempts DOHSA

The only conflict that might exist is between the general maritime law principles of *Gaudet* and DOHSA. Even the court below recognized the issue before it to be "which federal law to apply"—DOHSA or *Gaudet*. A6. The same basic conflict was addressed by the Court in *Higginbotham*—do the general maritime law principles of *Gaudet* extend to the high seas to allow recovery of loss of society damages? The Court in *Higginbotham* said no. The court below said yes.

Plaintiffs and *Amici* also reject DOHSA and, to varying degrees, general maritime law, as the applicable national law. They argue that the Court should look to federal common law, which, according to them, allows for the recovery of loss of society damages. Plaintiffs' Brief at 19-21; *Lockerbie Amicus Brief* at 12-22; *KAL Amicus Brief* at 19-22.

In rejecting DOHSA in favor of *Gaudet* or federal common law, neither the court below, plaintiffs nor *Amici*, adequately address the threshold issue of how a directly applicable federal statute, such as DOHSA, can be preempted by either the general maritime law principles of *Gaudet* or any notion of federal common law.

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[34] Plaintiffs' related argument that loss of society damages must be allowed in order to "deter" wilful misconduct disregards the nature of loss of society damages. Plaintiffs' Brief at 13-14. The function of loss of society damages, where allowed, is to compensate and *not* to punish or deter. Deterrence and punishment is the function of punitive damages, which the courts have held are not recoverable under the Convention. *Cf. Korean Air II*, 932 F.2d at 1489-91. *Drion*, at 211. In any event, the same types of compensatory damages are recoverable in a Warsaw Convention action, regardless of whether the Article 22 liability limit on recoverable damages applies or not.

a. *Gaudet* Does Not Extend to the High Seas

Gaudet dealt with the recovery of loss of society damages in a *Moragne*[35] death action by the dependent wife of a longshoreman killed in the territorial waters of the United States. The Court in *Gaudet* made a "policy determination that differed from the choice made by Congress"[36] in DOHSA and concluded that nonpecuniary damages for loss of society were available in a *Moragne* action for the death of a longshoreman in territorial waters. *Gaudet*, 414 U.S. at 585-91.

Later, in *Higginbotham*, a general maritime law and DOHSA action for the deaths of passengers arising out of a helicopter crash on the high seas, the Court addressed the effect of *Gaudet* where DOHSA applied. The Court first noted that *Gaudet* was broadly written and applied only to territorial waters and not to the high seas. *Id.* The question that the Court addressed in *Higginbotham*, therefore, was "which measure of damages to apply in a death action arising on the high seas—the rule chosen by Congress in 1920 [DOHSA] or the rule chosen by this Court in *Gaudet*." 436 U.S. at 623. The Court chose DOHSA. The Court found that Congress had made the choice for the Court in 1920 by limiting recoverable damages in DOHSA to pecuniary losses. Therefore, the recovery of loss of society damages under general maritime law was foreclosed by Congress in DOHSA. 436 U.S. at 623-25.

Higginbotham, as this case, involved the deaths of aviation passengers occurring on the high seas and the question whether to apply DOHSA or *Gaudet* in determining whether loss of society damages are recoverable. The court below chose to ignore *Higginbotham*, reject DOHSA and follow *Gaudet* as the applicable damage law for an aviation passenger killed on the high seas.

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[35] The Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), recognized a general maritime wrongful death cause of action based on unseaworthiness for the death of a longshoreman killed in territorial waters.

[36] *Higginbotham*, 436 U.S. at 622.

The principles of *Higginbotham* were reiterated by the Court in *Miles*, when the Court rejected an attempt to supplement the pecuniary damages available under the Jones Act with nonpecuniary damages for loss of society under the principles of *Gaudet*. *Miles*, 498 U.S. at 27-33. The Court emphasized the overriding preeminence of federal legislation on the subject and that a court cannot allow for recovery of damages under general maritime law which are not allowed by an applicable federal statute. *Id.*

Miles and *Higginbotham* make clear that, while a general maritime law death action may be pursued in conjunction with a statutory DOHSA or Jones Act action, the damages available under general maritime law cannot differ from or supplement the damages allowed by a federal statute. For this reason, no Circuit Court of Appeals, other than the court below, has disregarded DOHSA or permitted the recovery of loss of society damages for a death on the high seas under the general maritime law principles of *Gaudet*.

b. Federal Common Law Does Not Preempt DOHSA

Plaintiffs and *Amici* argue that loss of society damages are recoverable under federal common law, regardless of *Gaudet*. Even if federal common law recognizes loss of society damages, which it does not (*see infra* at Point III), it cannot serve to supplement or preempt the damages allowed by a directly applicable federal statute, such as DOHSA, any more than general maritime law can.

Federal common law is merely a necessary expedient "resorted to 'in the absence of an applicable Act of Congress' " when federal courts are forced to resolve issues which cannot be answered by or with reference to federal statutes alone. *Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)); *see Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). "Where a congressional scheme speaks directly to a question which would otherwise be answered by federal common law,

federal legislation 'preempts' federal common law." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984) (footnote omitted).

The rationale of *Higginbotham* and *Miles* is equally applicable to the arguments of Plaintiffs and *Amici* that federal common law controls. If a court were to supplement DOHSA with loss of society damages under federal common law, the court would be "rewriting rules that Congress has affirmatively and specifically enacted," by creating an entirely "different measure of damages", which Congress chose not to create and which the Court consistently has rejected in applying the Acts of Congress. *Higginbotham*, 436 U.S. at 625; *see Miles*, 498 U.S. at 31-33; *Tallentire*, 477 U.S. at 230-32; *Milwaukee*, 451 U.S. at 314.

As a statutory enactment expressly applicable to all deaths occurring on the high seas, DOHSA cannot be preempted or supplemented by *Gaudet* or federal common law.

III

LOSS OF SOCIETY DAMAGES ARE NOT RECOVERABLE UNDER GENERAL MARITIME LAW OR FEDERAL COMMON LAW

The driving force of the decision of the court below and the arguments of Plaintiffs and *Amici* is that there should be one uniform "federal" rule as to recoverable damages applicable to all Warsaw Convention cases in the United States. While uniformity in the types of recoverable compensatory damages in all Warsaw Convention cases in the United States may be a valid goal, a uniform rule cannot be chosen which is in complete disregard of a directly applicable federal statute, such as DOHSA. *Higginbotham*, 436 U.S. at 624.

The court below adopted general maritime law as the best source of federal common law. A5. Plaintiffs and *Amici*, to varying degrees, reject general maritime law as a source of law and argue that loss of society damages should be allowed

under "federal common law", derived from state law or civil rights cases. They reject DOHSA and other federal wrongful death statutes as the proper source for the development of a federal common law rule of recoverable damages in wrongful death actions. Plaintiffs' Brief at 17-22; *Lockerbie Amicus Brief* at 23-26; *KAL Amicus Brief* at 17-22.

If the Court desires to enunciate a uniform federal damage rule for all Warsaw Convention death actions, such a rule should be fashioned from DOHSA, general maritime law or other federal wrongful death acts, such as the Jones Act, 46 U.S.C. App. § 688, or Federal Employers' Liability Act (FELA), 45 U.S.C. App. §§ 51-59. For aircraft accidents on the high seas resulting in the deaths of passengers, DOHSA applies and must be the rule. For accidents over land, where there is no directly applicable federal wrongful death statute, adopting DOHSA as the appropriate analog would be consistent with all other federal wrongful death statutes. Any other rule would necessarily ignore DOHSA and the express policy of Congress in this area of the law. If uniformity consistent with federal law is truly to be achieved, recoverable damages in all Warsaw Convention cases under a "federal common law" should correspond to the damage rule of DOHSA.

Accordingly, whether the Court looks to general maritime law or federal statutes for a uniform Warsaw Convention rule on recoverable compensatory damages, the result is the same—loss of society damages are not allowed.

A. Loss of Society Damages Are Not Recoverable Under General Maritime Law No Matter Where the Death Occurs

The court below correctly recognized that the best source of federal common law is general maritime law[37], but erred in

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[37] *See Sample v. Johnson*, 771 F.2d 1335, 1345 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *Gillespie v. U.S. Steel Corp.*, 321 F.2d 518, 531 (6th Cir. 1963), *aff'd in relevant part*, 379 U.S. 148

choosing *Gaudet* as a current and valid representation of general maritime law. Plaintiffs and *Amici* reject the relevancy of general maritime law, except to the extent of agreeing with *Gaudet*. The decision of the court below and the arguments advanced by Plaintiffs and *Amici* based on *Gaudet*, overlook the development of general maritime law, culminating in *Miles*, which has rendered *Gaudet* meaningless.

Prior to the Court's decision in *Moragne v. State Marine Lines*, 398 U.S. 375 (1970), no general maritime law right of action for wrongful death existed. The Court in *Moragne* overruled *The Harrisburg*, 119 U.S. 199 (1886)[38], and recognized a general maritime law cause of action for wrongful death based on unseaworthiness for the death of a longshoreman killed in state territorial waters. While the Court did not define the types of damages recoverable (*Moragne*, 398 U.S. at 408), the Court did set forth two broad principles to guide lower courts in determining the scope of the *Moragne* action. The first was uniformity in federal maritime law (*Id.* at 401), and the second was to accord "special solicitude" to those persons who come within the admiralty jurisdiction of the federal courts. *Id.* at 387.

The first case in which the Court addressed the substantive content of the *Moragne* cause of action was *Gaudet*, 414 U.S. 573 (1974). The Court in *Gaudet* permitted the dependent spouse of a longshoreman killed in state territorial waters to recover damages for loss of society. *Id.* at 585.[39]

(1964); *Eichler v. Lufthansa German Airlines*, 794 F. Supp. 127, 130 (S.D.N.Y. 1992).

[38] The Court in *The Harrisburg* had held that maritime law does not afford a cause of action for wrongful death.

[39] The holding of *Gaudet* was extended in *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), to include dependents of injured longshoremen. *Alvez* has been rejected by lower courts. *See Horsley v. Mobil Oil Corp.*, 15 F.3d 200, 201-02 (1st Cir. 1994); *Murray v. Anthony J. Bertucci Const. Co.*, 958 F.2d 127, 131 (5th Cir.), *cert. denied*, 113 S. Ct. 190 (1992).

The Court placed the first limit on the scope of the *Gaudet* ruling in *Higginbotham*, 436 U.S. 618 (1978), when the Court declined to award loss of society damages to dependents of aviation passengers killed on the high seas. The Court reasoned that DOHSA expressly limits damages to pecuniary loss, thereby precluding the Court from reading into the statute recovery for nonpecuniary losses for a death occurring on the high seas. *Id.* at 625-26. In so doing, the Court recognized that *Gaudet* was broadly written and limited *Gaudet*'s holding to territorial waters. *Id. Higginbotham*, however, created an inconsistency in the general maritime law: loss of society damages were recoverable for a death in state territorial waters under *Gaudet*, but were unavailable for a death on the high seas under DOHSA. The Court recognized this inconsistency, but held that "DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy" and the need for uniformity cannot override a statute.[40] The inconsistency, of course, was not actually created by *Higginbotham*, as the Court there followed DOHSA; the inconsistency was created by *Gaudet*.[41]

The Court limited *Gaudet* further in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), where the Court again addressed the conflict between *Gaudet* and a federal maritime statute. In *Miles*, the Court held that nondependents of a Jones Act seaman may not recover loss of society damages under general maritime law. The Court expressed a strong policy for restoring uniformity in the types of recoverable damages in federal law based cases, regardless of whether the action is brought under DOHSA, the Jones Act, or general maritime law. *Miles*,

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40 *See Tallentire*, 477 U.S. at 230-32 (DOHSA's pecuniary remedies were exclusive and preempted a state wrongful death statute permitting the recovery of damages for loss of society).

41 As the Third Circuit recently stated: "*Gaudet* (together with its offspring, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980)) represents the first, and last, time that the Court departed from the guidance of federal statutory wrongful death remedies in shaping recovery for wrongful death." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 634 (3d Cir. 1994), *cert. granted*, 115 S. Ct. 1998 (1995).

498 U.S. at 27-33 ("Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.").

Relying on *Moragne*, the Court in *Miles* also reaffirmed the principle that federal maritime statutes "both direct and delimit" the actions of the courts, and that courts must look "primarily" to DOHSA and the Jones Act for guidance in determining whether to award loss of society damages, so that the nature of recoverable damages remains uniform, no matter where the death occurs. 498 U.S. at 27, 30-33. For this reason, the Court in *Miles* emphasized that "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." *Miles*, 498 U.S. at 31; *see Higginbotham*, 436 U.S. at 623.

This statement of the Court is significant, in view of the fact that the cause of action for which *Gaudet* created a remedy was statutorily eliminated by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq. Miles*, 498 U.S. at 28. In the view of one Court of Appeals, *Gaudet* "has therefore been condemned to a kind of legal limbo; limited to its facts, inapplicable on its facts, yet not overruled." *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir.), *cert. denied*, 114 S. Ct. 304 (1993).[42] The court in *Miller* may even have overstated the vitality of *Gaudet* after *Miles*, since the Court expressly declined to limit *Moragne* to its facts, because it "would no longer have any applicability at all" after the 1972 amendments to the LHWCA, but had no hesitancy in limiting *Gaudet* to its narrow facts. *Miles*, 498 U.S. at 28, 31.

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[42] *See Calhoun*, 40 F.3d at 634 (the Supreme Court "has narrowed [*Gaudet*] to its facts so that the decision may be, for all intents and purposes, a dead letter"); *see also Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084, 1090-92 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1060 (1994); *Murray*, 958 F.2d at 130-31.

The three basic principles underlying the decisions of the Court in *Moragne*, *Higginbotham*, *Tallentire* and *Miles* may be stated as follows:

1. Uniformity in the type of recoverable damages in a maritime wrongful death action, whether based on a federal statute or federal common law, is the controlling factor in determining whether certain types of damages, such as loss of society, are recoverable;

2. To ensure uniformity, the maritime statutes are to be the primary policy guide in developing general maritime law; and

3. General maritime law may supplement the statutory remedies created by Congress only "where so doing would achieve the uniform vindication of the statutory policies," *i.e.*, the courts must act "strictly within the limits imposed by Congress." *Miles*, 498 U.S. at 27.[43]

After *Miles*, lower courts have recognized that "uniformity" in maritime law should determine whether damages, such as loss of society, are recoverable, no matter where the injury or death occurs. *See Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1407-08 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995); *Kelly v. Panama Canal Commission*, 26 F.3d 597, 601-602 (5th Cir. 1994); *Nichols v. Petroleum Helicopters*, 17 F.3d 119, 122-23 (5th Cir. 1994); *Horsley*, 15 F.3d at 201-02; *Walker v. Braus*, 995 F.2d 77, 82 (5th Cir. 1993), *on remand*, 861 F. Supp. 527, 534-37 (E.D. La. 1994) (citing cases); *Miller*, 989 F.2d at 1458-59; *Smallwood v. American Trading & Transp. Co.*, 839 F. Supp. 1377, 1385 (N.D. Cal. 1993).

While the implication of the limits imposed upon *Gaudet* by the Court in *Higginbotham* and *Miles* are clear, lower courts have shown a reluctance to enforce those limits strictly,

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[43] *Miles* also appears to represent a doctrinal shift away from a broad reading of "special solicitude" and toward a more narrow one. The Court indicated in *Miles* that uniformity in maritime law requires that those who sue under general maritime law receive no more "solicitude" than those who sue under DOHSA or the Jones Act. *Miles*, 498 U.S. at 30-33.

since *Gaudet* has not been expressly overruled. *See Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994); *Nichols*, 17 F.3d at 122-23; *cf. Randall v. Chevron U.S.A.*, 13 F.3d 888 (5th Cir.), *modified*, 22 F.3d 568 (5th Cir.), *cert. denied*, 115 S. Ct. 498 (1994). This has resulted in conflicting decisions and improper extensions of *Gaudet* by lower courts, as evidenced by the decision of the court below and by *Lockerbie II*.

In resurrecting *Gaudet* and extending it not only inland (*Lockerbie II*), but to the high seas (*Zicherman*), the Second Circuit evidently has rejected *Miles* and *Higginbotham* and would limit their applicability only to cases brought under the Jones Act and DOHSA. *Zicherman*, 43 F.3d at 21 (A5); *Lockerbie II*, 37 F.3d at 829. The court below and in *Lockerbie II*, erroneously viewed general maritime law as being separate and independent from federal maritime statutes. This view disregards the directions of the Court in *Miles* and *Higginbotham* that a court cannot disassociate federal maritime statutes from the general maritime law, because the maritime statutes are the primary guide in defining general maritime law. A5-6.

As a result of its misapprehension of general maritime law, the court below has created the very disunity that the Court sought to eliminate in *Miles*. The ripple effect of the extension of *Gaudet* by the court below and in *Lockerbie II* already has reached the general maritime law outside the context of the Warsaw Convention. *See Saunders v. Cunard Line Ltd.*, 1995 Westlaw 329323 (S.D.N.Y. June 1, 1995) (relying on *Lockerbie II*, court held loss of society allowed for personal injury in territorial waters); *compare Sutton*, 26 F.3d at 903 with *Horsley*, 15 F.3d at 201, *Wahlstrom*, 4 F.3d at 1091-93, *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) and *Murray*, 958 F.2d at 130-31.

The problem began and still lies with *Gaudet*, which now stands as the *sole* source of confusion and disunity in the determination of damages recoverable under general maritime law. *Gaudet* no longer can be regarded as a valid representation of the general maritime law of the United States. In

order to ensure uniformity in the maritime law, in accordance with the congressional enactments, the Court should make clear what was implicit in *Miles* and expressly overrule *Gaudet*.

Contrary to the holding of the court below, loss of society damages simply are not recoverable under any principle of general maritime law, no matter where the death occurs.

B. No Federal Wrongful Death Statute Allows for the Recovery of Loss of Society Damages

Federal statutes dealing with similar subject matter are a prime repository of federal policy on a related subject and serve as the starting point for ascertaining federal common law. *Milwaukee*, 409 U.S. at 312-18; *see Miles*, 498 U.S. at 24. This is especially true in the case of wrongful death, because there is no general federal wrongful death action outside of admiralty law. Nevertheless, Plaintiffs and *Amici* reject the relevance of all federal wrongful death statutes, except the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674.

Congress has enacted several "federal" wrongful death statutes. While each statute is intended to address a specific subject, they all have one thing in common—only pecuniary damages are recoverable. FELA, 45 U.S.C. App. §§ 51-59, enacted in 1908 to provide a remedy to railroad workers injured or killed, has been interpreted consistently by the courts to allow recovery of only pecuniary damages. *Vreeland*, 227 U.S. at 71; *American Railroad Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 149-50 (1913). The Jones Act, enacted in 1920, creates a wrongful death action for seamen killed in the course of their employment through incorporation of FELA. DOHSA, also enacted in 1920, is a general statute and has the broadest application as it creates a death action for any "person" killed on the high seas. Both DOHSA and the Jones Act allow for the recovery of only pecuniary losses for wrongful death. *Miles*, 498 U.S. at 31-33; *Higginbotham*, 436 U.S. at 624-25.

These statutes are a manifestation of a congressional policy as to the types of wrongful death damages permitted under "federal" wrongful death law and are the most fertile source for a federal common law. The Ninth Circuit recognized the obvious relevance of these federal statutes in *Mexico City*, 708 F.2d at 415, where the court, taking guidance from *Moragne*, held that the Warsaw Convention creates a cause of action for wrongful death. As to the subsidiary elements of the Convention cause of action, the court suggested as potential references federal statutes, "particularly" DOHSA, to answer the damage issues not addressed by the Convention. *Id.* at 415 & n. 27.

The only federal statute Plaintiffs and *Amici* argue is relevant is the FTCA, which directs the courts generally to state law for a determination of recoverable compensatory damages. Plaintiffs and *Amici*, however, ignore the 1947 amendment to the FTCA.[44] The 1947 amendment provides in relevant part:

> If, however, in any case wherein death was caused, the law of the place . . . provides . . . for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, *measured by the pecuniary injuries* resulting from such death. . . .

28 U.S.C. § 2674 (emphasis added).

Courts applying this provision specifically look to DOHSA and FELA for guidance to determine the types of recoverable pecuniary damages in an applicable FTCA case. *See Hoyt v. United States*, 286 F.2d 356, 358-59 (5th Cir. 1961); *Montellier v. United States*, 202 F. Supp. 384, 420 (E.D.N.Y. 1962), *aff'd*, 315 F.2d 180 (2d Cir. 1963). Thus, even under

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[44] The FTCA was amended in 1947 to address the problem that arose under the wrongful death statutes of certain states, such as Alabama and Massachusetts, which provided that the only damages recoverable for wrongful death are punitive in nature. *See Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128, 129-31 (1956); H.R. Rep. No. 748, 80th Cong., 1st Sess. (1947).

the FTCA, when damages are to be determined under a "federal" law standard, only pecuniary damages are allowed.

DOHSA and the other federal wrongful death statutes have not remained stagnant but have been applied with no difficulty by the courts on a regular basis for over 75 years. During this time, Congress has never amended the statutes to allow for the recovery of nonpecuniary damages and the Court consistently has rejected all judicial attempts to allow the recovery of nonpecuniary damages under these statutes. *Miles*, 498 U.S. at 31-33 (Jones Act); *Higginbotham*, 436 U.S. at 624-25 (DOHSA); *Vreeland*, 227 U.S. at 71 (FELA).

Each time damages are determined at the federal level, Congress has specifically chosen a policy to allow only for the recovery of pecuniary losses. In developing a federal common law of damages to be applied in Warsaw Convention cases, there is no reason not to follow these clear directions of Congress. Indeed, this is the only way the Court can give effect both to DOHSA and Congressional policy in fashioning a national law of recoverable compensatory damages in all Warsaw Convention cases, whether arising from land based Article 17 accidents or those occurring on the high seas.

C. State Law and Civil Rights Cases Are Inappropriate Sources of Federal Common Law for Warsaw Convention Cases

Faced with the uniform federal policy expressed in all federal wrongful death statutes and the general maritime law, that loss of society damages are not recoverable, Plaintiffs and *Amici* argue that the proper source for federal common law is state law and civil rights cases. Federal common law is that law fashioned by federal courts through their interpretation of what Congressional policy would be and is not based upon any calculation of the majority of decisions from states. *Milwaukee*, 451 U.S. at 304.

Neither the statutes nor decisions of a particular state should be conclusive when fashioning a federal common law.

While many states today recognize loss of society damages, some states do not[45], others place monetary caps on nonpecuniary awards,[46] others only allow recovery for death of a spouse and/or a minor child[47] and some require financial dependency.[48] Moreover, some courts are reluctant to recognize loss of society damages absent specific statutory provisions allowing such damages. *See, e.g., Siciliano v. Capitol City Shows, Inc.*, 124 N.H. 719, 725, 475 A.2d 19, 21-22 (N.H. 1984); *Liff*, 49 N.Y.2d at 633, 404 N.E.2d at 1292, 427 N.Y.S.2d at 750. In fact, many states do not allow recovery of loss of society damages by nondependent parents. *See Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455, 460-61 & n.5 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986). While there are policy arguments on both sides as to the propriety and impropriety of loss of society damages,[49] it cannot be denied that such nonpecuniary damages are controversial. If such a recovery is to be allowed at the federal level, it should be for Congress, and not the courts to do so, especially in view of the fact that each time Congress has spoken directly on the types of wrongful death damages to be assessed at the federal level, it has allowed recovery for pecuniary losses only.

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[45] *See, e.g., Liff v. Schildkrout*, 49 N.Y.2d 622, 404 N.E.2d 1288, 427 N.Y.S.2d 746 (N.Y. 1980); Del. Code Ann. tit. 10, 3724 (Supp. 1994); D.C. Code Ann. § 16-2701 (1981).

[46] *See, e.g.*, Kan. Stat. Ann. § 60-1903 (1994); Me. Rev. Stat. Ann. tit. 18-A, § 2-804 (West 1981 & Supp. 1994); Wis. Stat. Ann. § 895.04 (West 1993 & Supp. 1994).

[47] *See, e.g., Zimmerman v. Lloyd Noland Foundation, Inc.*, 582 So. 2d 548 (Ala. 1991); *Siciliano v. Capitol City Shows Inc.*, 124 N.H. 719, 475 A.2d 19 (N.H. 1984); *Carey v. Lovett*, 132 N.J. 44, 622 A.2d 1279 (N.J. 1993); *Gillispie v. Beta Construction Co.*, 842 P.2d 1272 (Alaska 1992); Ky. Rev. Stat. Ann. §§ 411.135, 145 (Michie 1992); Vt. Stat. Ann. tit. 14, § 1492 (Supp. 1994).

[48] *See State v. Bouras*, 423 N.E.2d 741, 746 (Ind. Ct. App. 1981); *Masunaga v. Gapasin*, 57 Wash. App. 624, 790 P.2d 171, *review denied*, 115 Wash. 2d 1012, 798 P.2d 780 (Wash. 1990).

[49] *See Higginbotham*, 436 U.S. at 623-25; *Gaudet*, 414 U.S. at 605-11 (Powell, J., dissenting); *Siciliano*, 124 N.H. at 725, 475 A.2d at 27-22.

For similar reasons, the civil rights cases cited by Plaintiffs and the *Lockerbie Amici* are inappropriate reference points for the development of a federal common law as to wrongful death damages.[50] The Civil Rights Act, 42 U.S.C. § 1983, was enacted to address a specific type of harm related to the deprivation of a right, privilege or immunity secured by the Constitution or the laws of the United States. *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 7 (1st Cir. 1986). The statute is not a general wrongful death statute and does not apply where there has been no state action or where no constitutional right has been violated. *See Kaznoski v. Consolidated Coal Co.*, 368 F. Supp. 1022 (W.D. Pa.), *aff'd*, 506 F.2d 1051 (3d Cir. 1974). The civil rights cases awarding damages did so only after a careful review of the federal policy expressed in the civil rights legislation and the wrong the legislation was intended to prevent. The rationale of these cases cannot be given general application outside the context of the sphere of civil rights.

To adopt the rule urged by Plaintiffs and *Amici* would necessarily require the rejection of DOHSA.[51] The rule urged by KAL gives effect to DOHSA and is in accord with the policy of other federal statutes. If a uniform federal damage rule is to be adopted for Warsaw Convention cases, the most appropriate rule is general maritime law and the federal wrongful death statutes, such as DOHSA, which uniformly reject recovery of loss of society damages.

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50 *See* Plaintiffs' Brief at 20-22 and *Lockerbie Amicus Brief* at 22.

51 Almost all international flights involving the United States transverse the high seas for the majority of the flight. *See Williams v. United States*, 711 F.2d 893, 896 (9th Cir. 1983).

IV

EVEN IF LOSS OF SOCIETY DAMAGES ARE HELD TO BE AVAILABLE FOR A DEATH ON THE HIGH SEAS, THE COURT BELOW PROPERLY LIMITED RECOVERY TO DEPENDENT RELATIVES

"[I]t is inherent in the nature of wrongful death remedies that not every survivor is entitled to recover monetary damages. A line must be drawn." *Anderson v. Whittaker Corp.*, 692 F. Supp. 764, 772 (W.D. Mich. 1988), *aff'd in relevant part*, 894 F.2d 804 (6th Cir. 1990). The court below, recognizing that a line must be drawn, adopted the "well-established" rule under general maritime law that only dependent relatives may recover damages for loss of society. *Zicherman*, 43 F.3d at 22 (A8).

Plaintiffs and *Amici* reject the line drawn by the court below and other Circuit Courts of Appeal, as "absurd", unfair and irrational. Plaintiffs argue that "close family members" should be the line, the *Lockerbie Amici* suggest the adoption of the DOHSA schedule of beneficiaries and the *KAL Amici* offer no line.[52] These positions ignore the policy reasons and rationale underlying the adoption by the courts of financial dependency as the "most rational, efficient and fair" line. *Miles v. Melrose*, 882 F.2d 976, 989 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

The Second, Fifth and Sixth Circuits, faced with determining the appropriate beneficiaries for loss of society damages, have been guided by *Moragne* and *Gaudet*, which suggest that dependency and uniformity are the critical factors,[53] and have drawn the line at financial dependency. *See*

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[52] Plaintiffs' Brief at 22-23; *Lockerbie Amicus Brief* at 4-8; *KAL Amicus Brief* at 23-24.

[53] Although the Court has not specifically addressed the issue of appropriate beneficiaries, the Court has made reference to the intended beneficiaries as those "dependent" on the decedent. *Gaudet*, 414 U.S. at 501; *Moragne*, 398 U.S. at 382.

Lockerbie II, 37 F.3d at 829-30; *Wahlstrom*, 4 F.3d at 1091-93; *Anderson v. Whittaker Corp.*, 894 F.2d 804, 811-12 (6th Cir. 1990); *Melrose*, 882 F.2d at 988.

Denial of loss of society damages to a nondependent sibling and parent is consistent with the goal of uniformity because no one (spouse, parent, child, sibling) may recover for loss of society under DOHSA or the Jones Act. *Miles*, 498 U.S. at 27-32; *Higginbotham*, 436 U.S. at 623-26; *Sistrunk*, 770 F.2d at 459. Moreover, under DOHSA and general maritime law, a nondependent sibling is not entitled to recover even pecuniary damages. *Zicherman*, 43 F.3d at 22 (A10); *Evich v. Connelly*, 759 F.2d 1432, 1433 (9th Cir. 1985), *cert. denied*, 484 U.S. 914 (1987); *Bergen*, 816 F.2d at 1350; *In re ABC Charters, Inc.*, 558 F. Supp. 364, 366 (W.D. Wash. 1983).

Even the adoption of the DOHSA schedule of beneficiaries ("spouse, parent, child, or dependent relative"), as suggested by the *Lockerbie Amici*, would *not* allow a nondependent parent or sibling to recover loss of society damages. 46 U.S.C. App. § 761. As to a parent, to simply adopt DOHSA or the Jones Act beneficiaries would "adopt language from either statute without reference to how that language fits into each statute as a whole." *Anderson*, 894 F.2d at 812 n.8. DOHSA and the Jones Act "sets up a scheme where dependents are protected, to the exclusion of other persons who may conceivably have suffered injury." *Id.* Therefore, the requirement of financial dependency is written into the statute, insofar as damages are expressly limited to "pecuniary loss." *Id*; *see Melrose*, 882 F.2d at 989; *Sistrunk*, 770 F.2d at 459-61.

The only case Plaintiffs and *Amici* cite as supporting their argument is *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), a general maritime law action for five persons killed and four persons injured when a pleasure craft collided with a buoy in California territorial waters. *Id.* at 906. The district court awarded the parents of the decedents substantial damages for loss of society, regardless of dependency on the decedents. *Id.* at 915, 920. The Ninth Circuit affirmed, concluding that the dependency requirement for recovering loss of society dam-

ages is inconsistent with the humanitarian policy of providing special solicitude to those who come within the admiralty jurisdiction of the federal courts. *Id.* at 919-20. The court rejected the relevance of *Miles* and *Higginbotham*, reasoning: "The fact that the death of a seaman in territorial waters leads to recovery only of pecuniary damages is dictated by statute, *Miles*, 498 U.S. at 32-33, 111 S.Ct. at 325-26, and that statute does not limit recoveries for the deaths of non-seamen." *Sutton*, 26 F.3d at 917.

The decision in *Sutton* is inconsistent with *Miles* in that it created a non-uniform rule of recovery within the Ninth Circuit. *See Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (the uniformity requirement in *Miles* requires the conclusion that the spouse of an injured seaman may *not* recover loss of society damages under general maritime law). Thus, in the Ninth Circuit, as a result of *Sutton*, beneficiaries of non-seamen can recover loss of society, but beneficiaries of seamen cannot.

Moreover, the *Sutton* court gave little weight to the uniformity requirement of *Miles*, noting the inconsistent results reached by the Court in *Gaudet* and *Higginbotham*. 26 F.3d at 917 ("We do not consider ourselves free to give such weight to the interest of uniformity"). Regardless of the effects of *Gaudet* and *Higginbotham* on uniformity, *Miles* made clear that the Court was "restoring" uniformity to the maritime law and that the maritime statutes are to serve as the lower courts' primary guide in defining the elements of general maritime law.[54] *Sutton* is contrary to the principles of *Miles* and should be disregarded.

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[54] The *Sutton* court also stated that "[w]e . . . do not consider controlling the statement in *Miles* that '[t]he holding of *Gaudet* . . . applies only to longshoremen.' 498 U.S. at 39, 111 S. Ct. at 328. The point that the court was making was that *Gaudet* does not apply to seamen." 26 F.3d at 917 n. 19. No Circuit Court of Appeals has given such a limited reading of this language in *Miles*. *See Wahlstrom*, 4 F.3d at 1091-92; *Murray*, 958 F.2d at 130-31; *Miller*, 989 F.2d at 1459.

Similarly, the civil rights cases relied upon by Plaintiffs and *Amici* expressly reject the recovery of loss of society damages by siblings for many of the same reasons expressed by the courts in maritime cases—a line must be drawn. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1247 (7th Cir. 1984).

Finally, even if the Court were to look to state law, many states do not allow siblings or parents to recover for loss of society. *See Sistrunk*, 770 F.2d at 461 n. 5 (setting forth various state law provisions); *supra* notes 61-64 and accompanying text. In fact, some states impose a financial dependency requirement akin to general maritime law. *See supra* note 48.

So long as *Gaudet* remains, anomalies will continue to exist between general maritime law, DOHSA and the Jones Act. Should the Court conclude that loss of society damages are recoverable under the Warsaw Convention for a death on the high seas, limiting such a recovery to dependents will at least maintain some of the uniformity that exists today. Plaintiffs' line of "close family members" is neither helpful, nor supported by any federal or state law and ignores the entire body of general maritime law, a source of law Plaintiffs acknowledge to exist, but selectively ignore.

CONCLUSION

The judgment of the Court of Appeals that loss of society damages are recoverable for a death on the high seas in a death action governed by the Warsaw Convention should be reversed. But, if recovery is to be allowed, it should be only for those who demonstrate financial dependency at the time of decedent's death.

Respectfully submitted,

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Dated: July 1, 1995

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Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

49 Stat. 3019.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Article 25(1)

1. The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

* * *

49 Stat. 3020.

Article 28(2)

* * *

2. Questions of procedure shall be governed by the law of the court to which the case is submitted.

49 Stat. 3020.

Article 29(2)

* * *

2. The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

49 Stat. 3021.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

THE INTERNATIONAL TECHNICAL COMMITTEE OF LEGAL AVIATION EXPERTS

REPORT
of the Third Session

May 1928

[page 99]

EXHIBIT C

A REPORT

submitted by the International Technical Committee of Legal Aviation Experts
(the "C.I.T.E.J.A.")

ON BEHALF OF THE SECOND COMMISSION

by Mr. Henry de Vos, The Reporter

The attached draft convention, subjected to deliberation by the International Technical Committee of Legal Aviation Experts (the "C.I.T.E.J.A."), has the objective of **certain rules relating to the documents of carriage by air**—the travel ticket, the baggage ticket, the air bill of lading—**as well as the liability of the carrier by air and the limitation of such liability.**

This draft is the result of seven previous texts concerning the liability of the carrier and the bill of lading.

This high number of different redrafts indicates the breadth of the **preparatory studies** which have been done by your Committee and indicates as well the necessity to briefly recall to mind the process of this work.

---

1. A first preliminary draft on the liability of the carrier was submitted by the French government to the Conference of October 26, 1925.

2. This text was refashioned by the Second Commission instituted by the Conference and submitted to the latter on

November 3, 1925. Our eminent colleague, Mr. Pittard, was the reporter thereof. It established the bases of the draft on the subject matter of liability and on the limitation of such liability.

3. On November 6, 1925 the plenary Conference accepted a third text which slightly modified the preceding one.

4. A first preliminary draft on the bill of lading was then submitted by the undersigned reporter to the Second Commission which met in Paris on March 30, 1927.

5. The text then adopted by the International Technical Committee of Legal Aviation Experts in April of 1927 contains modifications accepted following upon the discussions which took place on the preceding text.

6. Following upon the discussion held during the course of the mentioned meeting of the International Technical Committee of Legal Aviation Experts (April of 1927) for examining the possibility of consolidating the two subjects into a single convention, a new preliminary draft was submitted by the undersigned reporter in June of 1927.

[page 100]

7. This text was modified in accordance with the deliberations of your Second Commission which met in Brussels from November 7 to November 10, 1927.

8. The preliminary draft, as it is presently submitted, reproduces the texts amended as a result of the discussions of the Second Commission which met in Paris on March 21 and March 22, 1928.

This draft is comprised of the following:

There is a Chapter 1 which provides the purpose of the convention and the precise limits of its scope of application.

A Chapter 2, comprised of three sections, contains the essential rules concerning the documents of carriage—the passenger ticket, the baggage check and the air waybill.

A Chapter 3 encompasses the provisions relating to the liability of the carrier and the limitation of such liability.

Chapter I—Purpose

The first two articles of the convention correspond to the first articles of all of the drafts.

It is appropriate to point out, however, that the third paragraph of Article 1 was specially added to the text at the request of the British Delegation in order to cover the case of successive transports.

* * *

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Chapter II—The Liability of the Carrier

(Article 21, et seq.)

With certain amendments, these provisions adopt the rules contained in the draft of the convention adopted by the plenary Conference of November 1925.

The reporter at that time stressed the main points and the doctrine of fault was accepted for the liability of the carrier to the passengers and for the goods; the burden of proof is incumbent on the carrier, and the presumption of fault is thus its responsibility, though this presumption is limited by the very nature of the transport which is involved.

* * *

[page 106]

* * *

With respect to the jurisdiction of the court, the draft adopts the court of the registered office of the operation, or of the place where the latter has an establishment through which the contract has been made, as well as the place of destination. In the event that the aircraft fails to arrive, the court of the place of the accident may also be given jurisdiction.

The jurisdiction of the domicile of the defendant has been replaced by a formula which is more practical for the carrier's business.

The most recent draft also specifies that the actions must be brought before a court of one of the contracting states.

In addition, it provides that, in the event of death, all actions must be brought before the first court to which the case was submitted, and that the judgment thus rendered shall have the force of *res judicata* in all of the contracting states.

These provisions are of such nature as to provide a broader application and greater uniformity for air law.

In the event of the death of the party legally representing the estate, any action, of whatever nature whatsoever, may be brought by those persons to whom such action pertains in accordance with the law of the nation of the deceased or, in the absence thereof, in accordance with that of his last domicile. But such action can only be exercised under the conditions and within the limitations which are provided for by the convention.

These provisions have the specific purpose of impeding persons who claim to have the right to bring actions outside of the convention; all of them have to adhere to the limitations of this convention.

The question has been posed in this regard as to whether one might not define the category of damages which is susceptible to compensation.

Although this question has appeared to be a very interesting one, a satisfactory solution has not been possible to be found prior to knowing exactly the bodies of statutory law of the various countries. It is understood that the question is to be studied subsequently when the point is clarified on determining which persons, according to the laws of the various nations, have the right to exercise an action against the carrier.

It should also be indicated that Article 33 accepts arbitration clauses which do not infringe on the rules of jurisdiction provided for in the convention.

These are the general lines of the draft which contain the two subject matters already adopted with respect to their essential principles by the International Technical Committee of Legal Aviation Experts (the "C.I.T.E.J.A.").

The work thus submitted has appeared to the Second Commission to be sufficiently complete in order to be the subject matter of a final convention, which would be a first step toward uniformity in air law, and it is in order to complete this first stage that it proposes to the International Technical Committee of Legal Aviation Experts that the draft of the convention which is submitted to it be ratified.

May 15, 1928
Henry De Vos.

COMITÉ INTERNATIONAL TECHNIQUE
D'EXPERTS JURIDIQUES AÉRIENS

COMPTE RENDU

DE LA 3ᵉ SESSION

MAI 1928

ANNEXE C

RAPPORT

présenté au Comité International Technique d'Experts Juridiques Aériens

(C. I. T. E. J. A.)

AU NOM DE LA DEUXIÈME COMMISSION

par M. Henry DE VOS, Rapporteur

Le projet de Convention ci-joint, soumis aux délibérations du C. I. T. E. J. A., a pour objet : *certaines règles relatives aux documents de transport aérien :* billet de passage, bulletin de bagages, et lettre de transport aérien, *ainsi qu'à la responsabilité du transporteur aérien et à la limitation de cette responsabilité.*

Ce projet est l'aboutissement de sept textes antérieurs concernant soit la responsabilité du transporteur, soit la lettre de transport.

Ce nombre élevé de rédactions différentes indique l'ampleur des *études de préparation* qui ont été faites par les memores de votre Comité et indique en même temps la nécessité de rappeler brièvement le processus de ces travaux.

1. Un premier avant-projet sur la responsabilité du transporteur fut présenté par le Gouvernement français à la Conférence du 26 octobre 1925.

2. Ce texte fut remanié par la Deuxième Commission instituée par la Conférence et soumis à celle-ci le 3 novembre 1925. Notre éminent collègue, M. PITTARD, en fut le Rapporteur. Il établit les bases du projet en matière de responsabilité et de limitation de cette responsabilité.

3. La Conférence plénière admit, le 6 novembre 1925, un troisième texte modifiant légèrement le précédent.

4. Un premier avant-projet sur la lettre de transport fut présenté ensuite par votre Rapporteur à la Deuxième Commission qui se réunit à Paris le 30 mars 1927.

5. Le texte adpoté ensuite par le C. I. T. E. J. A. en avril 1927 contient les modifications admises à la suite des discussions qui eurent lieu sur le texte précédent.

6. A la suite de la décision prise au cours de cette même réunion du C. I T. E. J. A. (avril 1927) d'examiner la possibilité de fusionner les deux matières en une Convention unique un nouvel avant-projet fut présenté par votre Rapporteur en juin 1927.

7. Ce texte fut modifié conformément aux délibérations de votre Deuxième Commission réunie à Bruxelles du 7 au 10 novembre 1927.

8. L'avant-projet tel qu'il se présente actuellement reproduit les textes amendés à la suite des discussions de la Deuxième Commission qui s'est réunie à Paris les 21 et 22 mars 1928.

Ce projet se présente comme suit :

Un chapitre 1er donne l'objet de la Convention et les limites précises de son champ d'application.

Un chapitre 2 contient en trois sections les règles essentielles concernant les titres de transport : billet de passage, bulletin de bagages et lettre de transport aérien.

Un chapitre 3 renferme les dispositions relatives à la responsabilité du transporteur et à la limitation de cette responsabilité.

Chapitre I. — Objet

Les deux premiers articles de la Convention correspondent aux premiers articles de tous les projets.

Il convient cependant de signaler que le troisième alinéa de l'article 1er a été spécialement ajouté au texte à la demande de la Délégation Britannique pour couvrir le cas de transports successifs.

* * * *

* * * *

Chapitre III. — Responsabilité du transporteur

(Articles 21 et suivants)

Ces dispositions reprennent, moyennant certains amendements, les règles contenues dans le projet de Convention adopté par la Conférence plénière de novembre 1925.

Le Rapporteur à cette époque en a souligné les points principaux la théorie de la faute a été admise dans la responsabilité du transporteur à l'égard des passagers et des marchandises ; le fardeau de la preuve incombe au transporteur ; il existe donc une présomption de faute à sa charge, mais cette présomption est limitée par la nature même du transport dont il s'agit.

Citons à cet égard le rapport de M. PITTARD :

« Que peut-on exiger du transport aérien ? Une organisation normale de son exploitation, un choix judicieux de son personnel, une surveillance constante de ses agents et préposés, un contrôle sérieux de ses appareils accessoires et des matières premières.

* * * *

* * * *

En ce qui concerne la compétence du tribunal, le projet retient le tribunal du siège de l'exploitation ou du lieu ou celle-ci possède un établissement par les soins duquel le contrat a été conclu, et le lieu de destination. En cas de non-arrivée de l'aéronef, le tribunal du lieu de l'accident peut également être rendu compétent.

La compétence du domicile du défendeur a donc été remplacée par une formule plus pratique pour l'exploitation de l'entreprise de transports.

Le dernier projet précise d'ailleurs que l'action doit être portée devant un tribunal d'un des Etats Contractants.

Il prévoit en outre qu'en cas de mort, toutes actions devront être portées devant le premier tribunal qui aura été régulièrement saisi et que le jugement ainsi rendu aura force de chose jugée dans tous les Etats Contractants.

Ces dispositions sont de nature à obtenir une application plus étendue et une unification plus grande du droit aérien.

En cas de décès de l'ayant droit, toute action, à quelque titre que ce soit, peut être exercée par les personnes auxquelles cette action appartient d'après la loi nationale du défunt ou, à défaut, d'après celle de son dernier domicile. Mais cette action ne peut être exercée que dans les conditions et les limites prévues par la Convention.

Ces dispositions ont un but précis qui est d'empêcher des personnes qui prétendent avoir des droits d'exercer des actions en dehors de la Convention ; elles doivent toutes rentrer dans les limites de cette Convention.

La question a été posée de savoir si l'on ne pourrait, à cet égard, déterminer la catégorie de dommages sujets à réparation.

Bien que cette question ait paru très intéressante, il n'a pas été possible de trouver une solution satisfaisante avant de connaître exactement les législations des différents pays. Il a été entendu que la question serait étudiée ultérieurement lorsque le point de savoir quelles sont les personnes qui, d'après les différentes lois nationales, ont le droit d'exercer une action contre le transporteur, aura été élucidé.

Il est à signaler encore que l'article 33 admet les clauses d'arbitrage qui ne dérogent pas aux règles de compétence prévues dans la Convention.

Telles sont les lignes générales du projet qui contient les deux matières adoptées déjà dans leurs principes essentiels par le C. I. T. E. J. A.

L'œuvre ainsi présentée a paru suffisamment complète à la Deuxième Commission pour pouvoir faire l'objet d'une Convention définitive qui serait un premier pas dans l'unification du droit aérien et c'est pour réaliser cette première étape qu'elle propose au C. I. T. E. J. A. de ratifier le projet de Convention qui lui est soumis.

15 mai 1928.

Henry de Vos.

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Nos. 94-1361, 94-1477

In The

Supreme Court of the United States

October Term, 1995

MARJORIE ZICHERMAN, Individually and as executrix of the estate of Muriel A.M.S. Kole, and MURIEL MAHALEK,

Petitioners/Cross-Respondents,

v.

KOREAN AIR LINES CO., LTD,

Respondent/Cross-Petitioner.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR THE PETITIONERS/CROSS-RESPONDENTS

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ARGUMENT

I. IT CANNOT BE SAID THAT LOSS OF SOCIETY IS NOT "DAMAGE."

The Warsaw Convention contains a simple directive to the courts of the United States: an air carrier "*shall be liable* for damage sustained in the event of the death . . . of a passenger." 49 Stat. 3018 (emphasis added). This imperative cannot be disregarded by any court, because the Warsaw Convention is the supreme law of the land. Thus, the *only* way to deny recovery to Marjorie Zicherman and Muriel Mahalek in this case is to conclude that the loss of Muriel Kole's society was not "damage" of any sort.

The conclusion that loss of society is not "damage" is belied by the dictionary definitions cited in the Petitioner's principal brief (at page 8), which KAL has elected not to address. It is also belied by common experience. The loss of a sister or daughter is far more devastating than the loss of any sum of money, but KAL's analysis forces the backwards conclusion that the latter event is damage, while the former is not.

A. Extrinsic evidence associated with the Warsaw Convention is inconclusive, and should not be relied on.

To support its position that Article 17 defers to local law for the elements of recoverable damages, KAL primarily relies on extrinsic evidence associated with the Warsaw Convention, particularly on remarks made by Henry de Vos in 1928. These remarks suggest that the

committee responsible for drafting the Warsaw Convention (CITEJA) could not agree on what damages should be compensable under Article 17 (KAL brief at 19). Mr. de Vos's remarks preceded the 1929 conference in Warsaw, where the Convention was actually debated and voted upon. The minutes of that 1929 conference contain little discussion of Article 17, and it is therefore impossible to determine what the delegates really thought about the meaning of the term "dommage."

In all likelihood, the various delegates to the 1929 Warsaw conference had a variety of opinions on the meaning of Article 17. Because the word "dommage" so clearly included non-pecuniary damages under French law (see Petitioner's Brief at 9-10), many of them may have assumed that "dommage" included, at a minimum, damages for loss of society. Others may have agreed with Mr. de Vos that the question should be left to local law. Sixty-five years after the fact, it is impossible to ascribe a single "intent" to a diverse group of delegates from many different nations.

At one point during the 1929 conference, the subject of a carrier's liability for the actions of its servants was debated. Georges Ripert, one of the French delegates, expressed the following general concern:

> We will do our best to find the formula which will be satisfactory, but it is agreed that, from this point on, we are absolutely opposed to a formula that would lead to the application of national law. It's the *first time* that application of national law is required and if it were allowed for this question, it would be required for

> others. From our point of view, one would thus arrive in destroying the convention, if one establishes recourse to national law upon each article.

Second International Conference on Private Aeronautical Law, at 66 (Horner *et al.* trans. 1975) (emphasis added). This concern was echoed by other delegates in a variety of contexts. *See, e.g., id.* at 35 (Alfred Dennis, Great Britain) and 64 (Amedeo Giannini, Italy). Thus, extrinsic evidence associated with the Warsaw Convention is inconclusive, and can usually be cited to support either side of a given problem of interpretation.

It is precisely because the intent of the Convention's drafters is so elusive that this Court should rely on the ordinary meaning of the words used in writing Article 17. *See generally United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992) (treaties, like statutes, should be construed by first looking to their terms); *United States v. Stuart*, 489 U.S. 353, 371-72 (1989) (Scalia, J., concurring) (extrinsic evidence cannot be used to contradict the plain meaning of a treaty provision). If a word as simple and as commonly used as the word "damage" requires an examination of extrinsic evidence to determine its meaning, then it is doubtful that any treaty provision could ever be applied based on its ordinary meaning.[1] "Damage" equals "loss," and therefore includes loss of society.

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[1] Contrary to KAL's assertion, the Petitioners did argue in the Second Circuit that the ordinary meaning of the term "damage" includes loss of society. Brief of the Plaintiffs/Cross-Appellants in Nos. 93-7490, 93-7546 (2d Cir. 1993) at page 19.

B. Subsequent practice of the parties to the Convention is also inconclusive.

At least one foreign court has ruled that the plain meaning of the word "damage" in Article 17 includes non-pecuniary losses. *Preston v. Hunting Air Transport Ltd.*, [1956] 1 Q.B. 454. The English High Court of Justice, Queen's Bench Division, held in *Preston* that Article 17 "does not refer particularly to financial loss, it refers to damage . . . " *Id.* at 461. This includes

> . . . loss which [the minor plaintiffs] inevitably must have sustained beyond the actual financial loss by the fact that they lost their mother as young children . . . As I interpret the words of article 17 it does seem to me that this is an item of damage for which the plaintiffs are entitled to be compensated.

Id. Thus, *Preston* did not really apply English law, as KAL asserts in its brief (KAL brief at 21); rather, the English court relied on the plain meaning of the word "damage" to reach its result.

The status of Article 17 in England has become somewhat less clear since *Preston* was decided. The 1961 Carriage by Air Act, 9 & 10 Eliz. 2, ch. 27, §3, brings Warsaw Convention cases within the ambit of the Fatal Accidents Act.[2] The Fatal Accidents Act provides only for recovery of pecuniary damages, plus a fixed amount for the bereavement of certain surviving relatives. However, the Warsaw Convention itself is set out as the First Schedule

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[2] The original 1846 Fatal Accidents Act has now been replaced by a new version enacted in 1976. Fatal Accidents Act, 1976, ch. 30 (Eng.).

to the Carriage by Air Act, and a Note following Article 17 cites the *Preston* case for the proposition that Article 17 "is not limited purely to financial loss." 4 Halsbury's Statutes at 33 (4th ed. 1985).

Apart from England, it is true that some other countries have enacted legislation defining the types of damages recoverable under Article 17.[3] This may be an indication that the legislative bodies of these countries viewed Article 17 as silent on the question, although the statutes they enacted might just as easily be viewed as a codification of what those legislators felt was the article's ordinary meaning. All other countries, most notably the United States, have chosen not to enact any enabling legislation, leaving courts to interpret the plain meaning of the phrase "damage sustained." On balance, then, the subsequent practice of the parties to the Convention is just as inconclusive as the drafting history that preceded its adoption. The ordinary meaning of "damage sustained" is the only reliable guide to interpreting Article 17.

II. ARTICLE 24 OF THE WARSAW CONVENTION DOES NOT ADDRESS RECOVERABLE DAMAGES FOR WRONGFUL DEATH

When luggage or goods are damaged on an international flight, jurists from around the world can all agree

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[3] Canada is one such nation. Interestingly, however, in some provinces loss of society is recoverable under Article 17. Haanappel, *The Right to Sue in Death Cases Under the Warsaw Convention*, 6 Air L. 66, 71 (1981).

that the owner of the damaged personal property is the proper party to file a lawsuit. Any recovery from the air carrier would then obviously go to compensate that party. When a passenger dies, however, there is no uniform international jurisprudence that would specify the appropriate persons to bring suit, or the proper way to distribute any recovery that the named plaintiff might be awarded. *See generally* Mankiewicz, *The Liability Regime of the International Air Carrier* 161 (1981).

Article 24 of the Warsaw Convention, by its own terms, addresses these procedural difficulties encountered when a passenger dies. The Article states that the conditions and limits of the Convention apply to accidents resulting in death, "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." 49 Stat. 3020. The modifier "respective" is critical: it means "relating to particular persons or things, *each to each.*" *Black's Law Dictionary* 1179 (5th ed. 1979) (emphasis added). It has the same import as the Latin term *inter se,* which is "used to distinguish rights or duties *between* two or more parties from their rights or duties to others." *Id.* at 735 (emphasis added).

By referring to "respective" rights, Article 24 thus applies only to the division of a recovery between a decedent's survivors and beneficiaries. The Article does *not* say that the term "damage" in Article 17 has no meaning, and it does not say that the elements of recoverable damages are left to local law. It just says that, once those damages are adjudicated, their distribution will be left to the law of the forum.

III. INTERNATIONAL AVIATION ACCIDENTS UNDER THE WARSAW CONVENTION CANNOT BE EQUATED WITH MARITIME ACCIDENTS UNDER DOHSA

If this Court decides that the elements of recoverable damages under Article 17 must be determined by reference to the law of the United States, it must take into account the unique structure and purpose of the Warsaw Convention. KAL's analysis ignores the Convention's unique character, and thereby works a great injustice to passengers on international flights.

A. The United States Congress has expressed no opinion on the elements of recoverable damages under Article 17.

In recent years, this Court has relied heavily on Congressional enactments to shape maritime jurisprudence. The rationale behind this approach is understandable: where Congress has spoken on a particular subject, the courts should listen carefully. Even if a statute is not directly applicable, courts should follow it closely if it seems to encompass the same subject matter as the case under consideration. *See e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 31 (1990).

For general maritime law wrongful death cases, DOHSA and the Jones Act may indeed provide Congressional guidance on the elements of recoverable damage.[4] There is no significant difference, for example, between

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[4] This proposition is not free from all doubt. *See American Export Lines, Inc. v. Alvez*, 447 U.S. 274, 283 (1980).

the stabbing death of a sailor on the high seas (covered by DOHSA), the death of a sailor due to negligence at any location (covered by the Jones Act), and the stabbing death of the sailor in *Miles* that occurred while his vessel was in port (not directly covered by any statute). It makes some sense to borrow a statute to shape general maritime law in a case like *Miles*.

In a case governed by the Warsaw Convention, however, the analysis used in *Miles* breaks down. The Warsaw Convention has a $75,000.00 cap on damages that is unknown to any maritime statute or any general maritime jurisprudence. This damages cap was unheard of in 1920 when DOHSA and the Jones Act were debated and enacted, and it is therefore impossible to say that Congress has "directly spoken" on the subject of Muriel Kole's death.

In fact, Congress might well be shocked to learn that its restrictive pecuniary loss statutes were being borrowed in a Warsaw Convention case, where passengers generally have an extremely limited recovery to begin with. As noted in the Amici brief of Philomena Dooley *et al.* (at pages 15-16), at least one Congressman, Senator Robert Kennedy, expressed grave concern that the Warsaw Convention unduly restricted the recovery available to international air travelers. Borrowing DOHSA and the Jones Act is therefore a mistake in cases that are subject to the Warsaw Convention's unique system of liability limits, because it is impossible to know whether or not Congress would approve.

It must be remembered that, in adopting the Warsaw Convention, Congress also adopted the Convention's

goal of uniform rules to govern international air transport. Borrowing DOHSA's damages rules would defeat this Congressional purpose, because DOHSA says nothing about deaths that occur on land, and a different rule would have to be fashioned to cover aviation accidents that do not occur on the high seas. Indeed, although KAL correctly points out that most international air travel occurs over water, it overlooks the fact that most international air *accidents* occur over land. Sand, *Limitation of Liability and Passengers' Accident Compensation Under the Warsaw Convention*, 11 Am. J. of Comp. Law 21, 25 (1962) (of 40 American cases dealing with passenger death or injury in international air carriage, only 6 occurred on the high seas).

In its Amicus brief, Pan American World Airways suggests that DOHSA should be borrowed for *all* Warsaw Convention accidents, whether they occur over land or water (Pan American brief at page 28). Although this approach might produce some uniformity, it stretches the rationale of *Miles* far past the breaking point. Pan Am takes the following logic from *Miles:*

> 1. A Congressional enactment that applies to the negligence death of a sailor should properly be borrowed to cover a general maritime death action brought by a sailor on unseaworthiness grounds;

and transforms it into the following:

> 2. A statute enacted in 1920 to govern deaths that occur aboard ships on the high seas should be borrowed to govern the death of airline passengers who are killed when their airplane crashes into land.

Rather than following such strained reasoning, this Court should recognize that Congress has not directly spoken on the subject of international aviation accidents. It would be a legal fiction to suggest that DOHSA "speaks" to the death of Muriel Kole.

B. Freed from the shackles of DOHSA and the Jones Act, this Court should permit recovery of loss of society damages under the Warsaw Convention.

Because DOHSA and the Jones Act are incompatible with the Warsaw Convention, this Court is writing on a clean slate. Loss of society can and should be compensable under Article 17 of the Warsaw Convention. There are three reasons for this.

First, *stare decisis*. This Court has already observed that federal damages law is not stagnant, but must evolve as public policies change (so long as it is not constrained by Congressional enactments). *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583 (1979). In *Gaudet* and in *Alvez*, loss of society was recognized as a feature of federal damage law where DOHSA and the Jones Act have no role to play.

Second, deterrence. KAL takes the position that compensatory damages have no deterrent value (KAL brief at page 30, n. 34). This is untrue. A party that is potentially liable for compensatory damages will always try to be careful and avoid any such liability. The higher the potential exposure, the greater the incentive to be careful.

In this case, of course, Muriel Kole was killed not just because KAL was careless, but because the airline committed willful misconduct. To limit KAL's liability to pecuniary damages would greatly impair the deterrent value of the Warsaw Convention, which lifts the damages cap in cases of willful misconduct.

Third, uniformity. By fashioning a unique body of damage law applicable to all Warsaw Convention cases brought in United States courts (whether the accident occurred over land or water), this Court will promote the Warsaw Convention's goal of uniformity.

Finally, this Court should reject the Second Circuit's decision to limit loss of society damages to financially dependent relatives. A surviving family member who works hard to earn a living should not have fewer rights than one who does not. Nothing in the language, history, or purpose of the Warsaw Convention supports such a limitation on damages.

CONCLUSION

For the reasons discussed in this brief and in the Petitioners' principal brief, the judgment of the Court of Appeals on the issue of loss of society damages should be vacated, and the judgment of the District Court awarding

loss of society damages to Zicherman and to Mahalek should be affirmed.

Respectfully submitted,

The Petitioners/
Cross-Respondents,
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Nos. 94-1361, 94-1477

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, Individually and as executrix of the estate of Muriel A.M.S. Kole, and MURIEL MAHALEK,

Petitioners/Cross-Respondents,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent/Cross-Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT/CROSS-PETITIONER

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15 pp

Respondent/Cross-Petitioner KOREAN AIR LINES CO., LTD. ("KAL") submits this supplemental brief pursuant to Sup. Ct. Rule 25.5 to bring to the Court's attention the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Alcabasa v. Korean Air Lines Co., Ltd.*, 62 F.3d 404 (D.C. Cir. 1995), which was decided after KAL's Brief was filed.[1]

The *Alcabasa* decision was rendered in another case arising out of the destruction of KAL flight KE007 on September 1, 1983. The Court of Appeals in *Alcabasa* addressed the issue of whether "a relative of a passenger killed when Korean Air Lines flight 007 crashed into the Sea of Japan has standing to bring a wrongful death suit against the airline without first being appointed the deceased's 'personal representative' by a state court." 62 F.3d at 404-05 (A2a). The district court had dismissed the action upon the basis that (1) standing under the Warsaw Convention[2] is determined in accordance with "local law" and (2) the applicable "local law" was the law of the District of Columbia, which allows only the personal representative of a decedent to bring an action for wrongful death. 62 F.3d at 405 (A3a). The Court of Appeals affirmed the dismissal, but on the basis of a different analysis.

The Court of Appeals held that when an international treaty leaves a particular policy determination to the laws of the contracting states, the treaty refers to the laws of the nations that are signatories to the agreement and not to the laws of the political subdivisions of a signatory state. 62 F.3d at 407 (A6a-7a). As the death in *Alcabasa* occurred on the high seas, the court found that the Death on the High Seas Act

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[1] *Alcabasa* was decided on August 8, 1995 and KAL's brief was filed on July 1, 1995. The opinion in *Alcabasa* is reproduced in the Appendix hereto at A1a. References preceded by "A" refer to pages in the Appendix.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. § 1502.

("DOHSA"), 46 U.S.C. App. § 761 *et seq.*, directly applied in determining standing to sue in an action involving the Warsaw Convention. 62 F.3d at 406-07 (A6a). Under § 761 of DOHSA, only the personal representative of a decedent has standing to bring a wrongful death action. Therefore, the Court of Appeals affirmed the dismissal of the action by the district court, but on the basis of DOHSA and not upon the basis of the law of the District of Columbia relied upon by the district court.

While *Alcabasa* involved only the issue of standing, the rationale of the Court of Appeals lends further support to the argument that DOHSA is the applicable national law for the determination of the elements of recoverable damages for deaths occurring on the high seas, during the course of transportation governed by the Warsaw Convention:

1. The Court of Appeals in *Alcabasa* found that DOHSA applies to Warsaw Convention death actions involving aircraft accidents on the high seas. 62 F.3d at 406-07 (A6a).

2. The *Alcabasa* decision rebuts the arguments of Petitioners/Cross-Respondents ("Plaintiffs") and the *Amici* for Petitioners that DOHSA is not relevant to the damage issues left by the Convention for determination by national law.[3]

3. The *Alcabasa* court rejected the argument that, because the Warsaw Convention does not specify who has standing to sue, a court has the discretion to disregard an applicable federal statute and create the law as it sees fit. 62 F.3d at 407 (A8a). The court in *Alcabasa* explained:

> This position reveals a fundamental misunderstanding of the text of the Warsaw Convention and of our role as

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[3] *See* Brief for Petitioners/Cross-Respondents at 15-22; Brief *Amicus Curiae* of the Plaintiffs' Committee in *In re Air Crash Disaster at Lockerbie, Scotland*, MDL 799 (E.D.N.Y.) ("*Lockerbie Amicus Brief*") at 23-26; Brief *Amici Curiae* of Philomena Dooley, *et. al.*, Plaintiffs in *In re Korean Air Lines Disaster*, MDL 565 (D.D.C.) ("*KAL Amicus Brief*") at 24-26.

> interpreters of the law. Under Article 24(2) of the Warsaw Convention, it is the "*contracting states* [who] decide the standing . . . of claimants. . . ." *KAL I*, 932 F.2d at 1485 (emphasis added). The relevant "contracting state" in this case is the United States.
>
> In discerning the underlying legal rule, we are bound by the applicable pronouncements of Congress. It is true that courts are often called upon to fashion common law rules to supplement maritime statutes because Congress has never enacted a comprehensive body of maritime law. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). But when "[t]he Death on the High Seas Act . . . does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.* Mr. Alcabasa asks us to go even a step further than supplementing Congress's pronouncement: He requests that we ignore Congress's clear determination that only a personal representative may bring a wrongful death action arising from an accident on the high seas. We, of course, must decline.

62 F.3d at 407-08 (A8a).

The argument rejected by the court in *Alcabasa* is akin to the arguments of Plaintiffs and *Amici* for Petitioners herein that because the Warsaw Convention does not specify what types of damages are recoverable, a court has the discretion to allow recovery for loss of society damages in fashioning "federal common law", even though such damages are prohibited by DOHSA. *See* Brief for Petitioners/Cross-Respondents at 17-22; *KAL Amicus Brief* at 19-22; *Lockerbie Amicus Brief* at 10-16.

The rationale of *Alcabasa* applies equally to the determination of the issue of recoverable damages. Just as DOHSA determines who has standing to sue in a Warsaw Convention case arising from a death on the high seas, DOHSA is the

applicable national law which determines the elements of recoverable damages in such a case.

Respectfully submitted,

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Dated: October 10, 1995

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 19, 1995 Decided August 8, 1995

No. 94-7013

ALEXANDER ALCABASA,
APPELLANT

v.

KOREAN AIR LINES CO., LTD.,
APPELLEE

Appeal from the United States District Court
for the District of Columbia

(No. 84cv02647)

Marvin L. Jeffers argued the cause and filed the brief for appellant.

Andrew J. Harakas, with whom *George N. Tompkins, Jr.*, and *Timothy J. Lynes* were on the brief, argued the cause for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before BUCKLEY, WILLIAMS, and RANDOLPH, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: This case presents the single question of whether a relative of a passenger killed when Korean Air Lines flight 007 crashed into the Sea of Japan has standing to bring a wrongful death suit against the airline without first being appointed the deceased's "personal representative" by a state court. The district court found that only the personal representative has standing to bring such an action. We affirm, although on the basis of a different analysis.

I. BACKGROUND

On September 1, 1983, Korean Air Lines ("KAL") flight 007, bound for Seoul, South Korea, from New York via Anchorage, strayed into Soviet airspace, was shot down by a Soviet military aircraft, and crashed into the Sea of Japan. All 269 passengers on board died. To manage the proliferation of lawsuits that followed, the Judicial Panel on Multidistrict Litigation consolidated suits against KAL from around the country and assigned the matter to the U.S. District Court for the District of Columbia for a trial on the common issue of the airline's liability. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 575 F. Supp. 342 (J.P.M.L. 1983).

At the trial, the plaintiffs argued that the KAL flight crew erred in programming a navigational system prior to departing Anchorage; that the crew must have realized the error before or shortly after leaving Anchorage; and that rather than return and face possible disciplinary action, the crew decided to continue on the programmed course in spite of a known risk that the flight might stray into Soviet airspace. *See In re Korean Air Lines Disaster of Sept. 1, 1993*, 932 F.2d 1475, 1478 (D.C. Cir. 1991) (*"KAL I"*). The jury returned a verdict of willful misconduct against KAL, which we affirmed. *Id.* at 1490. Individual actions were then

returned to their courts of origin for the determination of damages. *See Zicherman v. Korean Air Lines Co.*, 43 F.3d 18, 20 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995).

Lilia Bayona was one of the passengers killed in the tragedy. In 1984, appellant Alexander Alcabasa, who claimed to be Ms. Bayona's widower, brought a wrongful death lawsuit against KAL in the U.S. District Court for the District of Columbia. There is no dispute that Mr. Alcabasa brought the suit in his individual capacity and was never appointed to serve as the personal representative of Ms. Bayona's estate. The following year, Lilia Bayona's brother, Felino Bayona, secured an appointment as the personal representative of his sister's estate by a state court in New Jersey, where Lilia was domiciled at the time of her death. In his capacity as personal representative, Felino Bayona filed suit against KAL in the U.S. District Court for the District of New Jersey. *Felino Bayona, as Administrator ad Prosequendum and General Administrator of the Estate of Lilia Bayona v. Korean Air Lines, Inc.*, No. Civ. A. 85–3819 (D.N.J.). Mr. Bayona and KAL negotiated a settlement of $450,000, and the case was dismissed in 1993.

Meanwhile, KAL filed a motion for summary judgment in Mr. Alcabasa's suit asserting that he lacked standing to bring it because he was not the personal representative of the deceased. The district court granted KAL's motion on the basis of three legal conclusions: First, the Warsaw Convention, which governs the case, leaves the question of standing to the local law of signatory states; second, District of Columbia wrongful death law is the appropriate local law; and third, District of Columbia law permits only the personal representative of the deceased to maintain a wrongful death action. *Alcabasa v. Korean Air Lines Co.*, No. Civ. A. 84–2647 (D.D.C. Nov. 4, 1993) ("*Memorandum Opinion*"). We find that the district court applied the wrong law but reached the correct result.

II. Analysis

A. The Warsaw Convention

The parties agree that this wrongful death action arising out of an international air travel disaster is "governed by the terms of the Warsaw Convention, a multilateral treaty to which the United States has adhered since 1934." *KAL I*, 932 F.2d at 1484. *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 1(1), 49 Stat. 3000, T.S. No. 876 (1934) ("Warsaw Convention"), *reprinted in* 49 U.S.C. app. § 1502 note (1988). Their dispute concerns the proper interpretation of the treaty's provisions concerning the question of standing. Articles 17 and 24 are the Convention's relevant sections. The former establishes that

> [t]he Carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft....

Warsaw Convention, art. 17, 49 U.S.C. app. § 1502 note. The latter provides:

> (2) In the cases covered by article 17 [damage actions can only be brought subject to the conditions and limits set out in the Convention], *without prejudice to the questions as to who are the persons who have the right to bring suit* and what are their respective rights.

Id., art. 24 (emphasis added).

Mr. Alcabasa contends that the "without prejudice" clause of Article 24(2) implies that all parties who have wrongful death claims against a carrier may bring separate suits. His interpretation arguably finds support in a decision of the U.S. District Court for the Southern District of New York concerning the same disaster in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 807 F. Supp. 1073 (S.D.N.Y. 1992) ("*KAL–SDNY*"). That court found that "[t]he Warsaw Convention ... does not limit recovery to the personal represen-

tative of the decedent and affirmatively provides for suit by persons other than passengers" and, in fact, cited our opinion in *KAL I* for this proposition. *KAL–SDNY*, 807 F. Supp. at 1080. For strategic reasons, KAL did not challenge this aspect of the district court's opinion in its subsequent appeal to the Second Circuit. *See Zicherman*, 43 F.3d 18. KAL argues here, however, that the *KAL–SDNY* decision was both incorrect and based on an erroneous reading of our opinion in *KAL I*.

We agree with KAL on both counts. To set the record straight, in *KAL I* we at no point discussed whether standing to bring a wrongful death suit was limited to a personal representative of a decedent, nor did we discuss the subject of personal representatives. In considering what types of damage awards were permitted by the Convention, we found that "Article 24 allows contracting states to decide the standing and respective rights of claimants who seek recovery under Article 17." *KAL I*, 932 F.2d at 1485 (internal quotation marks omitted). Our discussion established that the Warsaw Convention not only does not create a single, uniform rule of standing but, quite to the contrary, defers such determinations to the legal regimes of the signatory states. We reiterate this interpretation here and note that it conforms with the views of other circuits that have examined Article 24(2). *See In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1284 (2d Cir. 1991) ("the drafters gave up any attempt to decide who could sue" but instead limited liability "no matter how many plaintiffs were involved or what their rights were under local law"); *In re Mexico City Aircrash of Oct. 31, 1979*, 708 F.2d 400, 414 (9th Cir. 1983) (import of Article 24(2) is that "the question of who are the persons upon whom the action devolves in the case of death [is] to be left to local law apart from the Convention" (internal quotation marks omitted)).

B. Law Governing Standing to Sue

The novel legal question presented in this case is not whether standing must be determined by reference to the

laws of the Convention's "contracting states," *KAL I*, 932 F.2d at 1485, but what that law is in this particular context. KAL argues that the question of Mr. Alcabasa's standing is controlled by the Death on the High Seas Act ("DOHSA"), which provides in pertinent part:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State ... the personal representative of the decedent may maintain a suit for damages in the district courts of the United States....

46 U.S.C. § 761 (1988).

In *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), the Supreme Court eliminated any doubt that DOHSA is applicable to accidents involving aircraft as well as ships by applying it to a helicopter crash 35 miles off the Louisiana coast. *Id.* at 218. DOHSA applied, the Court reasoned, because the "helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an island ... to the shore." *Id.* at 219. The Court also determined that the statute preempts State law where it applies. *Id.* at 232. Because KAL flight 007's function—ferrying passengers across the Pacific Ocean—was also one "traditionally performed by waterborne vessels" and because Mr. Alcabasa does not claim that the "wrongful act" that "caused" Ms. Bayona's death did not occur on the high seas, we find that DOHSA is the applicable law of the United States in this case. Under DOHSA, only the personal representative of the deceased may bring suit for wrongful death, *see, e.g., Futch v. Midland Enters., Inc.*, 471 F.2d 1195, 1196 (5th Cir. 1973); 2 *Benedict on Admiralty* § 83(a)(1) (7th ed. 1995); and a "personal representative" is by definition a court-appointed executor or administrator of an estate, not merely an heir. *Briggs v. Walker*, 171 U.S. 466, 471 (1898). Thus, Mr. Alcabasa's attempt to sue must fail.

Although the district court correctly concluded that standing under the Warsaw Convention is determined in accordance with "local law," it erred by assuming the relevant local

law is the law of the District of Columbia. *Memorandum Opinion* at 5. When courts, including this one, determine that an international treaty leaves a certain policy determination to "contracting states," they refer to the laws of the nations that are signatories to the agreement, not the political subdivisions thereof. *See In re Mexico City*, 708 F.2d at 415 (questions of "who are the persons entitled to assert [a] cause of action [under the Warsaw Convention] may be determined by reference to . . . federal statutes"). In many instances, of course, there is no single "law of the United States"; and the structure of our federal system requires reference to the laws of the various States to determine the relevant national law. Here, however, we are dealing with a federal statute, DOHSA, that preempts state law.

We are aware that, in *Zicherman*, the Second Circuit rejected KAL's similar argument that it should look to DOHSA to determine what types of damage claims are cognizable under the Warsaw Convention. 43 F.3d at 21. Instead, it referred to federal common law "general maritime principles," which, in that case, yielded a different result than DOHSA would have. *Id.* at 21–22. The court found that it could not "reconcile DOHSA's limitation of damages to pecuniary loss with the 'aim of the [Warsaw] Convention's drafters and signatories . . . to provide full compensatory damages for any injuries or death covered by the Convention. . . .'" *Id.* at 22 (quoting *In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988*, 37 F.3d 804, 829 (2d Cir. 1994)). Whatever the merits of the Second Circuit's analysis of damages under the Convention, we are concerned here with the issue of standing, which Article 24 commits to the laws of the signatory states. In light of the Supreme Court's holding, in *Offshore Logistics*, that DOHSA governs tort claims arising out of accidents on the high seas, we must determine standing in accordance with its provisions.

Rather than argue that DOHSA does not apply to this case, Mr. Alcabasa asks that we ignore DOHSA and instead fashion a common law rule that would permit his suit. To do so would be equitable, he believes, because permitting only personal representatives to sue would subject the rights of

the bereaved to the vagaries of state probate law and encourage races to the probate court. The problems embodied in such a rule are illustrated, in his opinion, by the facts of this case: Mr. Alcabasa alleges that Mr. Bayona secured his appointment as his sister's personal representative by fraudulently denying Mr. Alcabasa's existence to the New Jersey probate court.

Mr. Alcabasa's plea seems to assume that because the Warsaw Convention does not specify who has standing to sue, there is no governing law and, therefore, we have the discretion to create it as we see fit. He concedes that we might look to DOHSA for guidance, but believes we need not. This position reveals a fundamental misunderstanding of the text of the Warsaw Convention and of our role as interpreters of the law. Under Article 24(2) of the Warsaw Convention, it is the "*contracting states* [who] decide the standing ... of claimants...." *KAL I*, 932 F.2d at 1485 (emphasis added). The relevant "contracting state" in this case is the United States.

In discerning the underlying legal rule, we are bound by the applicable pronouncements of Congress. It is true that courts are often called upon to fashion common law rules to supplement maritime statutes because Congress has never enacted a comprehensive body of maritime law. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). But when "[t]he Death on the High Seas Act ... does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Id.* Mr. Alcabasa asks us to go even a step further than supplementing Congress's pronouncement: He requests that we ignore Congress's clear determination that only a personal representative may bring a wrongful death action arising from an accident on the high seas. We, of course, must decline.

Although it does not bear directly upon the resolution of this case, it is worth noting that where only a personal representative may maintain a wrongful death suit, persons in Mr. Alcabasa's position are not without recourse to protect

their legal rights. Some courts have found, for example, that a potential beneficiary of a wrongful death claim may be permitted to intervene in a suit if he can establish that his interests are at odds with the decedent's personal representative. *See, e.g., Smith v. Clark Sherwood Oil Field Contractors*, 457 F.2d 1339, 1345 (5th Cir. 1972). Furthermore, a personal representative has a fiduciary duty to bargain for the rights of all the decedent's beneficiaries and to turn over to them their appropriate share of any proceeds. *See, e.g., Chicago, Burlington & Quincy R.R. v. Wells-Dickey Trust Co.*, 275 U.S. 161, 163 (1927); *Calton v. Zapata Lexington*, 811 F.2d 919, 922 (5th Cir. 1987). A failure to do either can give rise to a cause of action against the personal representative. *Calton*, 811 F.2d at 922.

III. Conclusion

Under United States law, as referenced by Article 24(2) of the Warsaw Convention, only the personal representative of Lilia Bayona may maintain a suit against KAL for her wrongful death. If Mr. Alcabasa did not receive proper compensation for the death of Ms. Bayona, he might have a cause of action against her personal representative, but he may not force the airline to litigate a claim it had a right to believe was settled in 1993. The decision of the district court granting summary judgment for KAL is therefore

Affirmed.

MOTION FILED
MAY 31 1995

Nos. 94-1361, 94-1477

In The

Supreme Court of the United States

October Term, 1994

MARJORIE ZICHERMAN, individually and as executrix of the estate of Muriel A.M.S. Kole, and Muriel Mahalik,

Petitioner,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF PHILOMENA DOOLEY, ET AL. IN SUPPORT OF PETITIONER ZICHERMAN

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Nos. 94-1361, 94-1477

In The

Supreme Court of the United States

October Term, 1994

MARJORIE ZICHERMAN, individually and as executrix of the estate of Muriel A.M.S. Kole, and Muriel Mahalik,

Petitioner,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF PHILOMENA DOOLEY, ET AL. IN SUPPORT OF PETITIONER ZICHERMAN

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INTRODUCTION

Philomena Dooley, as Personal Representative of the Estate of Cecilio Chuapoco, deceased, and others identified in the Appendix to the Motion, hereby respectfully move for Leave to File a Brief Amici Curiae in this case in support of Petitioner, Marjorie Zicherman, as provided in Rule 37 of the Rules of this Court. The consent of the attorneys for the Petitioners has been obtained. The consent of the attorneys for the Respondent Korean Air Lines Co., Ltd. (hereinafter "KAL") was requested. Although consent was refused, Respondent does not object to this Motion for Leave to File Brief Amici Curiae.

After the air disaster of September 1, 1983 in which a KAL Boeing 747 was destroyed, the catastrophe giving rise to the underlying *Zicherman* action, numerous claims were filed in the United States district courts across the country. All federal court actions were transferred by the Judicial Panel on Multi-District Litigation (J.P.M.L.) to the United States District Court for the District of Columbia, per Judge Aubrey E. Robinson, Jr., for coordinated and consolidated pretrial proceedings on the common liability issues. *See In re Korean Air Lines Disaster of September 1, 1983*, 575 F.Supp. 342 (J.P.M.L. 1983). On August 2, 1989, a jury returned a verdict that the shootdown of KAL Flight KE 007 by Soviet military aircraft and the deaths of all on board were proximately caused by the "wilful misconduct"[1]

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[1] The claims against KAL were unquestionably governed by the Warsaw Convention, formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934), *reprinted* in note following 49 U.S.C. App. §1502. Pursuant to the provisions of the Warsaw Convention, the

of the KAL flight crew.[2] KAL appealed; the Court of Appeals for the District of Columbia Circuit affirmed the finding of wilful misconduct. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 920, 616 (1991).

After liability was confirmed, United States District Judge Aubrey E. Robinson, Jr. remanded all actions that had not been originally filed in that court to the originating district courts. Several district courts issued orders relating to the right to a jury trial, to measures of damages, and to applicable beneficiaries in Warsaw Convention actions. *See, e.g., In re Korean Air Lines Disaster*, 798 F.Supp. 755 (E.D.N.Y. 1992); *In re Korean Air Lines Disaster*, 807 F.Supp. 1073 (S.D.N.Y. 1992); *In re Korean Air Lines Disaster*, 814 F.Supp. 592 (E.D. Mich. 1993); *In re Korean Air Lines Disaster*, 814 F.Supp. 599 (S.D.N.Y. 1993); *Park v. Korean Air Lines*, 1992 WL 331092 ___ F.Supp. ___ (S.D.N.Y. 1992); *Hollie v. Korean Air Lines Disaster*, 834 F. Supp. 65 (S.D.N.Y. 1993); *In re Korean Air Lines Disaster of September 1, 1983*, M.D.L. 565, CV-83-2793 *et al*, Memorandum Opinion and Order, April 8, 1993 (D.D.C. 1993); *Saavedra v. Korean Air Lines Co., Ltd.*, No. C-84-9324 *et al.*, Memorandum Opinion and Order, Oct. 19, 1992 (C.D. Cal. 1992); *Bayona v. Korean Air Lines Co., Ltd.*, No. 85-3819, Memorandum Opinion and Order, Feb. 1, 1993 (D.N.J. 1993).

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carrier's liability is limited to a monetary cap unless the conduct causing the injury was "wilful misconduct". The verdict by the jury operated to remove the monetary limit on damages.

[2] The jury also returned a verdict for punitive damages which was reversed on appeal. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

Trials on damages were held and verdicts entered in the United States District Court for the Southern District of New York (including *Zicherman v. Korean Air Lines Co., Ltd.*), in the Eastern District of Michigan, in the Central District of California, in the Northern District of California, and in the District of Columbia.

Then on December 13, 1993, Korean Air Lines filed a Motion to Vacate and Set Aside the Final Judgment on the Issue of Liability and Grant a New Trial Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. In response to that Motion, District Judge Aubrey E. Robinson, Jr. requested the J.P.M.L. by letter dated February 4, 1994 to re-transfer all damages cases pending in the other district courts to his court for centralized disposition of KAL's Rule 60(b) Motion. The J.P.M.L. ordered the transfer or re-transfer of all KAL damage claims pending in other district courts to the District of Columbia on April 12, 1994. As of that date, however, several cases had been tried to verdict (including the *Zicherman* action) and were pending in the United States Courts of Appeals for the Second, Ninth, Sixth, and District of Columbia Circuits. Accordingly, those cases were not affected by the J.P.M.L.'s Order since the Panel's jurisdiction only extends to United States District Courts. 28 U.S.C. §1407. Those appeals are proceeding according to individual schedules and are still pending in the Courts of Appeals identified in the Appendix.

After the J.P.M.L. re-transferred all actions to the District Court for the District of Columbia, District Judge Aubrey E. Robinson, Jr., stayed all further proceedings until the Rule 60(b) Motion was decided. On July 1, 1994, Judge Aubrey E. Robinson, Jr., denied KAL's Rule 60(b) Motion. *In re Korean Air Lines Disaster*, 156 F.R.D. 18

(D.D.C. 1994). KAL appealed the denial of the Motion to the United States Court of Appeals for the District of Columbia Circuit. By Order dated April 6, 1995, the Circuit Court unanimously affirmed District Judge Aubrey E. Robinson's denial of KAL's Motion. *In re Korean Air Lines Disaster*, ___ F.3d ___, 1995 U.S. App. Lexis 8840 (D.C. Cir. 1995) (per curiam).

All of the district court cases that had been re-transferred to the District of Columbia, as well as those that had originally been filed in that court, are currently pending before District Judge Aubrey E. Robinson, Jr., as set forth with more particularity in the Appendix to the Motion.

This Motion for Leave to File a Brief Amici Curiae is filed on behalf of all plaintiffs in the District Court and Courts of Appeals (other than *Zicherman*) whose actions arise as a result of the deaths of passengers on board Korean Air Lines Flight 7 (KE 007) on September 1, 1983, which deaths resulted from the wilful misconduct of agents, servants and employees of Respondent KAL during international air transportation which implicates the provisions of the Warsaw Convention.

ARGUMENT

In the Writs for *Certiorari* pending before the Supreme Court, this Court will decide whether loss of society damages are available in a cause of action arising from the Warsaw Convention as "damage sustained". The particular case in which *Certiorari* was granted, *Zicherman v. Korean Air Lines*, involves the sister and mother of a deceased passenger. In *Zicherman*, the Second Circuit held that only dependents may recover damages for loss of a decedent's society. *Zicherman v. Korean Air Lines*, 43 F.3d

18, 22 (2d Cir. 1994), *cert. granted*, 63 U.S.L.W. 3745 (U.S. Apr. 18, 1995) (Nos. 94-1361, 94-1477).

This Court's decision on whether loss of society damages are "damage sustained" within the meaning of the Warsaw Convention will have far-reaching effects on all of the KE 007 cases currently pending in the courts below. The cases below encompass a wide variety of family settings. The familial relationships of the claimants to the decedents vary widely, presenting a wide spectrum of family circumstances. The Court's decision on the issues addressed in the Writs for *Certiorari* are critically important to the plaintiffs below whose beloved family members have been killed as a result of the egregious misconduct of the Respondent KAL. Thus, this Court's decision has direct implications for the lives of scores of families beyond the family in the *Zicherman* action.

Petitioner Zicherman will necessarily concentrate on the peculiar facts of that case. The proposed *Amici* tender a brief that will treat the issues more generically. We believe that our contribution should assist the court in setting the issues presented in a broader context, thus ensuring a wider grasp of the grave importance of this decision for all passengers who travel in international flight to which the Warsaw Convention is applicable and, particularly, to the Amici herein.

Dated: May 31, 1995

Respectfully submitted,

SPEISER, KRAUSE, MADOLE & COOK

By _____

Juanita M. Madole

APPENDIX

I. Plaintiffs whose cases are currently pending in the United States District Court for the District of Columbia are as follows:

	Case No.	Plaintiff	Decedent
1.	83-2793	Philomena Dooley	Cecelio Chuapoco
2.	83-2940	Kimberly Saavedra	Jan Hjalmarsson
3.	83-3177	Anne K. Fletcher and Anne Hutchinson Powrie	Ian Powrie
4.	83-3289	Mayuree Siripoon	Jintana Siripoon
5.	83-3793	Parvaneh Zareh	Darioush Zareh
6.	83-3890	In Jig Lin	San Mei Lin
7.	84-0331	Robert Boyar	Jan Moline
8.	84-0332	Robert Boyar	Michael Truppin
9.	84-0542	Sung Sheen Uhm	Ok Soon Chung
10.	84-1707	Shirley Katz	Jack Katz
11.	84-1710	Carl M. Cole	Kwang Woon Siow
12.	84-2858	Allan J. Levenson	Sung Boo Yoon
13.	85-2788	Indep Ing.	Property Loss
14.	85-3444	Robert Boyar	Park
15.	84-9334	Kimberly Saavedra	Tomiko Kohno
16.	85-9330	Kimberly Saavedra	Hiroaki Kawana
17.	85-5327	Kimberly Saavedra	C. Kim
18.	85-5329A	Kimberly Saavedra	J. Lee, W. Lee, H. Jung
19.	85-5329B	Kimberly Saavedra	H. Kim

20.	85-5329C	Kimberly Saavedra	L. Kim
21.	85-4869	Kimberly Saavedra	Sayuri Mano
22.	85-5329D	Kimberly Saavedra	H.S. Park
23.	85-5490	Kimberly Saavedra	Lee
24.	83-4624	Maria Beirn	James Beirn
25.	83-4626	Robert Speir	Kathy Brown Speir
26.	83-3890	Hans Ephraimson-Abt	Alice Ephraimson-Abt
27.	84-1521	Chong Cha Kim	Jin Hong Kim
28.	84-1707S	Joann C. Dunn	Susan Campbell
29.	85-5757	Leonore D. Lebow	Diane Ariyadej and Sammy Ariyadej
30.	84-5248	Diana Chao	Su-Jen Chan
31.	84-5247	Diana Chao	Yee Shine Chan
32.	84-0691	Tzen Chang	Mason Chang
33.	84-1117	Andi Donovan	Tsai Chen Chang
34.	84-0693	Chi-Chin Lin	Ju-Yen Cheng
35.	83-8765	R. Caltabellatta	Celita Chuapoco
36.	83-7717	R. Caltabellatta	Mary Chuapoco
37.	84-4083	Adhuk Homlaor	Tommy Homloar & Amporn Hansuwan-pisit
38.	84-0670	Chan May Kung	Chin Fan Kung
39.	84-7901	Hee Sook Lee	Eun Hyung Lee
40.	84-0688	Liu Tseui Yu Lee	Li-Cheng Lee
41.	84-0669	Shen Yon Liu	Yun Hsin Chung
42.	84-0675	Shen Yon Liu	Chao Po Liu

43.	84-0681	Shen Yon Liu	Hsuan Yun Hsin Chung
44.	83-6977 83-7903	Eun Jung Oh	Anna Song
45.	84-0788	Lih-Hwa Yu Chen	C. Tien
46.	84-0677	Wang-Huey Ping Yeh	Cheng-Liu Yeh
47.	83-7231	David Wu Dunn	Sirena Wu Dunn

II. The following cases arising out of the subject air disaster are currently pending in the indicated United States Courts of Appeals:

1. *Bickel, et al. v. Korean Air Lines Co., Ltd.*, (Edna Doris Miller, Joyce Chambers, Eleanor Bissell, Hazel James, and Margaret Zarif, deceaseds) Nos. 93-2144, 93-2206, 93-2259, 93-2341, 93-2549, 94-1096, 94-1098, 94-1100, 94-11021 (6th Cir. docketed Sept. 2, 1993).

2. *Saavedra v. Korean Air Lines Co., Ltd.*, (Masakasu Yamaguchi, deceased) Nos. 94-55018, 94-55060, 94-55161 (9th Cir. docketed Jan. 6, 1994).

3. *Hollie v. Korean Air Lines Co., Ltd.*, (Frances Mae Swift, deceased) No. 94-7208 (2d Cir. docketed Feb. 25, 1994)

4. *Saavedra v. Korean Air Lines Co., Ltd.*, (Makoto Okai and Yoko Okai, deceaseds) Nos. 94-55495, 94-55496 (9th Cir. docketed Apr. 18, 1994).

5. *Ocampo v. Korean Air Lines Co., Ltd.*, (Suellyn Ocampo, deceased) Nos. 94-5323, 94-5424 (D.C. Cir. docketed Oct. 31, 1994).

6. *Oldham v. Korean Air Lines Co., Ltd.*, (John Oldham, deceased) Nos. 94-5321, 94-5338 (D.C. Cir. docketed Nov. 17, 1994).

7. *Maikovich v. Korean Air Lines Co., Ltd.*, (Allen Kohn and Lillian Kohn, deceaseds) No. 94-5371, (D.C. Cir. docketed Dec. 23, 1994).

Nos. 94-1361, 94-1477

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BRIEF AMICI CURIAE OF PHILOMENA DOOLEY, ET AL. IN SUPPORT OF PETITIONER ZICHERMAN

QUESTION PRESENTED FOR REVIEW

Since the Warsaw Convention allows recovery for "damage sustained", are damages for loss of society recoverable?

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TREATY PROVISIONS INVOLVED

Amici Curiae are the surviving family members or personal representatives of the estates, or both, of passengers who were killed while engaged in international transportation by air within the meaning of the Warsaw Convention, a multilateral treaty governing the rights and remedies of international air passengers. Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C. App. 1502.

Article 17 sets forth the causes of action available under the Treaty as follows:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Also involved is the provision of the Treaty which establishes that the air carrier cannot avail itself of a limitation on compensatory damages for egregious conduct, Article 25:

> (1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

STATEMENT OF THE CASE

On September 1, 1983 a Korean Air Lines Co., Ltd. (hereinafter "KAL") Boeing 747 being operated as KE 007 en route from New York's JFK Airport to Seoul, South Korea was shot down by military aircraft of the former Soviet Union while in Soviet airspace approximately 350 miles north of its assigned route of flight. All 269 persons on board the plane perished. Survivors of the victims filed wrongful death actions against KAL in several federal district courts, all of which were transferred to the United States District Court for the District of Columbia (per Judge Aubrey E. Robinson, Jr.) pursuant to 28 U.S.C. §1407. The *Amici Curiae* are the surviving family members or personal representatives[1], or both, of the deceased

[1] The plaintiffs in the actions below are as follows, with the respective decedent passengers identified in parentheses: Philomena Dooley (Cecelio Chuapoco); Anne K. Fletcher, Anne Hutchinson Powrie (Ian Powrie); Mayuree Siripoon (Jintana Siripoon); Parvaneh Zareh (Darioush Zareh); In Jig Lin (San Mei Lin); Robert Boyar (Jan Moline); Robert Boyar (Michael Truppin); Sung Sheen Uhm (Ok Soon Chung); Shirley Katz (Jack Katz); Carl M. Cole (Kwang Woon Siow); Allan J. Levenson (Sung Boo Yoon); Robert Boyar (Park); Kimberly Saavedra (Jan Hjalmarsson, Yooko Okai, Tomiko Kohno, Hiroaki Kawana, Makoto Okai, C. Kim, J. Lee, W. Lee, H. Jung, H. Kim, L. Kim, Sayuri Mano, H.S. Park, Lee); Maria Beirn (James Beirn); Robert

passengers whose damages claims are still pending in the district court and four Circuit Courts of Appeals.

In 1989, a jury trial commenced in the District Court for the District of Columbia to determine whether KAL had committed "wilful misconduct", an affirmative finding of which would preclude KAL from invoking the $75,000 per passenger monetary cap[2] that KAL otherwise

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Speir (Kathy Brown Speir); Hans Ephraimson-Abt (Alice Ephraimson-Abt); Chong Cha Kim (Jin Hong Kim); Joann C. Dunn (Susan Campbell); Leonore D. Lebow (Diane Ariyadej, Sammy Ariyadej); Diana Chao (Su-Jen Chan); Diana Chao (Yee Shine Chan); Tzen Chang (Mason Chang); Andi Donovan (Tsai Chen Chang); Chi-Chin Lin (Ju-Yen Cheng); R. Caltabellatta (Celita Chuapoco); R. Caltabellatta (Mary Chuapoco); Adhuk Homlaor (Tommy Homloar, Amporn Hansuwanpisit); Chan May Kung (Chin Fan Kung); Hee Sook Lee (Eun Hyung Lee); Liu Tseui Yu Lee (Li-Cheng Lee); Shen Yon Liu (Yun Hsin Chung); Shen Yon Liu (Chao Po Liu); Shen Yon Liu (Hsuan Yun Hsin Chung); Eun Jung Oh (Anna Song); Lih-Hwa Yu Chen (C. Tien); Wang-Huey Ping Yeh (Cheng-Liu Yeh); David Wu Dunn (Sirena Wu Dunn); Nan Oldham (John Oldham); Marsha J.K. Maikovich (Allen and Lillian Kohn); Eric Forman (Evelyn Forman); Edward Ocampo (Suellyn Ocampo); Daisy Bickel (Eden Doris Miller); Dorothy Jones (Joyce Chambers); Richard Bowden (Eleanor Bissell); Willie N. James (Hazel James); Michael D. Jones (Margaret Zarif); Barbara Swift Hollie (Francis Mae Swift); Michael Kole (Murial A.M.S. Kole).

[2] Under the Warsaw Convention, the carrier can avail itself of a per passenger monetary limit of approximately $8,300. Because of American dissatisfaction with the low limit, air carriers agreed to (and the Civil Aeronautics Board approved) an increase in the limit to $75,000 per passenger for flights to, from, or with a stopover in the United States. Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol, Civil Aeronautics Board Agreement 18900, note following 49 U.S.C. App. §1502 (approved by Civil Aeronautics

had available under the Treaty to limits its liability. On August 2, 1989, the jury returned a verdict holding KAL liable for wilful misconduct which was a proximate cause of the passengers' deaths. On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the finding of wilful misconduct.[3] *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1425 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991).

After denial of *certiorari*, District Judge Robinson remanded all of the federal cases which had not been filed in his court to the originating district courts for the Southern District of New York, the Eastern District of New York, the District of New Jersey, the Central District of California, the Northern District of California, the Eastern District of Michigan, and the District of Massachusetts for litigation on issues of damages.

Thirteen jury trials and one bench trial were conducted in the United States District Courts for the Eastern District of New York, the Eastern District of Michigan, the District of Columbia, the Central District of California, and the Northern District of California. Appeals were taken from the verdicts and are currently pending in the United States Courts of Appeals for the District of

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Board Order E-23680 May 13, 1966, 31 Fed. Reg. 7302). *See generally*, Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

[3] The jury had also awarded punitive damages; that verdict was reversed on appeal. *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 994 (1991).

Columbia Circuit, the Sixth Circuit, the Ninth Circuit, and the Second Circuit.[4]

An appeal was taken in *Zicherman v. Korean Air Lines*, which had been tried in the Southern District of New York, to the United States Court of Appeals for the Second Circuit. On November 3, 1994, the Second Circuit affirmed the District Court's verdicts except that it vacated damages for loss of society, holding that such damages are not recoverable unless the surviving relatives were financially dependent on the decedent. The *Zicherman* court also denied a right to recover for mental injury suffered by the survivors. On December 5, 1994, the Second Circuit withdrew its initial opinion and filed an amended opinion holding that the jury's awards for loss of support and loss of inheritance were also subject to a financial dependency requirement. *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18 (2d Cir. 1994). Petitions for Writs of *Certiorari* were filed with this Court by both Zicherman and KAL. On April 18, 1995, this Court granted both Petitions for Writs of *Certiorari*. 63 U.S.L.W. 3745 (U.S. Apr. 18, 1995) (Nos. 94-1361, 94-1477).

In addition to the claims currently pending in the Courts of Appeals, there are 46 wrongful death actions currently awaiting damages disposition in the United States District Court for the District of Columbia.[5]

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[4] *See* Appendix to Motion for Leave to File Brief Amici Curiae.

[5] All actions were returned to the United States District Court for the District of Columbia following a Motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure filed in that Court by KAL to set aside the liability judgment and for a new trial on liability. At the request of Judge Robinson, the Judicial

SUMMARY OF THE ARGUMENT

Article 17 of the Warsaw Convention establishes an independent cause of action for wrongful death and personal injuries sustained during international transportation by air, whether on board the aircraft, or in the course of embarking or disembarking. *See* Article 17, Appx. A-1.[6] The liability of the carrier for such deaths and injuries is for "damage sustained". The ordinary usage of the words of the Treaty and the shared expectations of the Treaty's drafters confirm that "damage sustained" includes damages for loss of a decedent's care, comfort and society. The Treaty imposes no requirement that damages for loss of society, which are essentially damages for the destruction of a close family relationship, be conditioned upon financial dependency.

The Warsaw Convention was conceived by its drafters to achieve several goals. One goal was to enable

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Panel for Multi-District Litigation re-transferred all of the actions from other district courts to the District of Columbia for a consolidated decision on KAL's Rule 60(b) motion. Judge Robinson denied the motion. *In re Korean Air Lines Disaster of September 1, 1983*, 156 F.R.D. 18 (D.D.C. 1994). KAL appealed. The Court of Appeals for the District of Columbia Circuit unanimously affirmed Judge Robinson's decision. *In re Korean Air Lines Disaster of September 1, 1983*, ___ F.3d ___, 1995 U.S. App. LEXIS 8840, (D.C. Cir. 1995) (per curiam). A petition for *certiorari* has not been filed. The other actions arising from the KE 007 catastrophe currently remain in the United States District Court for the District of Columbia and further proceedings have been stayed by that Court. A list of the wrongful death actions is contained in the Appendix to the Motion for Leave to File a Brief Amici Curiae.

[6] "Appx." followed by a page number refers to the Appendix attached hereto which contains relevant provisions of the Warsaw Convention.

families of passengers who were killed or persons injured in international flights to be compensated for the losses incurred. To implement that goal in an era when it was difficult to establish the causes of airplane accidents, the drafters shifted the burden of proof to the carrier to prove that it had taken "all necessary measures" to prevent the accident. *See*, Article 20(1), Appx. A-1. The *quid pro quo* for the presumption of the carrier liability was the right of the carrier to limit its liability for ordinary negligence to a known monetary amount for each passenger. A second important goal of the Convention, however, was to deter carriers from particularly egregious misconduct which was the equivalent to "wilful misconduct". *See*, Article 25, Appx. A-1-A-2. The method chosen to deter such wilful misconduct was to provide that the carrier committing such outrageous behavior be obliged to pay for all resulting injuries.

"Moral" damages such as for loss of society were well-established in civil law countries when the Treaty was drafted. The drafting history contains no hint that the drafters intended to preclude damages for loss of society or to limit damages to pecuniary losses. Nowhere in the text of the Treaty is the word "pecuniary", or its equivalent, mentioned. Rather, the drafters of the Treaty left to each of the signatory countries the exact delineation of recoverable damages and applicable beneficiaries, as long as the damages assessed were consistent with the goals of the Treaty. Only by permitting a broad range of compensatory damages, including damages for loss of society, can the goal of deterring egregious misconduct be achieved. In delineating the damages available in the cause of action established by the federal Treaty, federal

common law must be consulted to implement inherently federal policies.

In addition to effectuating the goals of the Treaty, acknowledging damages for loss of society is consistent with federal common law policies and its evolution of remedies for tortious conduct. Federal common law is ascertained by reference to its application in analogous areas, to federal statutes that may address like issues and to the policies independently adopted by state legislatures on similar matters. The federal common law must also reflect the policies meant to be achieved by the Treaty's goals. Federal common law provides a recovery for family members' loss of a decedent's society.

ARGUMENT

I. THE WARSAW CONVENTION ITSELF CREATES AN INDEPENDENT AND SUBSTANTIVE CAUSE OF ACTION WITH ITS ATTENDANT RIGHTS AND REMEDIES

Article 17 of The Warsaw Convention creates an independent and substantive cause of action for personal injuries and wrongful deaths which occur in international transportation, which action establishes a right to recover for "damage sustained". *See Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) (hereinafter referred to as *"Floyd"*) (holding that Article 17 itself provides the cause of action for personal injuries); *In re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400, 409-16 (9th Cir. 1983) (containing an exhaustive analysis the judicial evolution of the Warsaw cause of action in American courts); *Benjamins v.*

British European Airways, 572 F.2d 913 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); M. Milde, *The Problems of Liabilities in International Carriage by Air* 24 (Caroline Univ. 1963). (The Warsaw Convention lays down a uniform substantive law regime of the liability of the carrier for damage sustained by a passenger if the occurrence which caused the damage took place during the carriage by air.) Since the Warsaw Convention creates an independent cause of action for wrongful death, the breadth of the remedies must be defined by the words and intent of the Treaty itself, the context in which the written words are used, and the expectations of the drafters. *Floyd, supra*, 499 U.S. at 534-35.

Because the only authentic text of the Warsaw Convention is in French, the French text of Article 17 must guide this analysis. *Floyd*, 499 U.S. at 534 (citing *Air France v. Saks*, 470 U.S. 392, 397 (1985)). The text reads as follows:

> *Le transporteur est responsable du dommage survenu* en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement. 49 Stat. 3005 (emphasis added).

The American translation of the French text, employed by the Senate when it ratified the Convention in 1934, and previously utilized by this Court, *Floyd, supra*, 499 U.S. at 535, reads:

> *The carrier shall be liable for damage sustained* in the event of death or wounding of a passenger

> or any other bodily injuries suffered by the passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 49 Stat. 3018 (emphasis added).

Thus, under Article 17, an air carrier is liable for the wrongful death of a passenger when three conditions are satisfied: (1) There has been an accident in which (2) the passenger was killed as a result of said accident which occurred on board an aircraft or in the course of the operations of embarking or disembarking, from which there was (3) damage sustained. It cannot be denied that the deaths of the passengers on KE 007 occurred while they were passengers on board an aircraft in international flight and that the events causing the deaths were an accident within the meaning of Article 17. *See generally Air France v. Saks, supra.* Thus, Article 17 is the foundation for the cause of action for these wrongful deaths. Its words and their meanings must be explored to define the cause of action. *Floyd, supra,* 499 U.S. at 534-35 (citing *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694 (1988)) and (quoting *Sociéti Nationale Industrielle Aerospatiale v. United States District Court,* 482 U.S. 522, 534 (1987)); *Air France v. Saks,* 470 U.S. 392, 397 (1985); *accord Chan v. Korean Air Lines Co., Ltd.,* 490 U.S. 122, 134 (1989); *Maximov v. United States,* 373 U.S. 49, 53-54 (1963). The Court may also look to the history of the Treaty, the negotiations, and the practical construction adopted by the parties. *Floyd, supra,* 499 U.S. at 435 (citing *Air France, supra,* 470 U.S. at 396) (quoting *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431-432 (1943)); *accord Volkswagenwerk, supra,* 486 U.S. at 700.

A. The Words Of The Text And Their Context

1. "DOMMAGE SURVENU"

The Warsaw Convention was drafted by Continental jurists from both civil law and common law countries. Civil law countries, including France, provided full compensation for all damage sustained ("dommage survenu") as a result of an injury or death as long as they were certain and direct. *In re Korean Air Disaster of September 1, 1983, supra,* 932 F.2d at 1487 (citing G. Miller, *Liability in International Air Transport* 112 (1977) (hereinafter "G. Miller")); R. Mankiewicz, *The Liability Regime of the International Air Carrier* 156 (1981) (hereinafter "R. Mankiewicz"). "Dommage survenu" included "dommage matérial" which provided compensation for pecuniary loss resulting from death or injury. G. Miller, *supra,* at 112. It also included "dommage moral" which provided compensation for non-pecuniary damages such as for pain and suffering of a victim of an accident or the sufferings of the family of the victim in the case of death. G. Miller, *supra,* at 112-113; R. Mankiewicz *supra,* at 156.

Thus, the drafters and signatories of the Treaty intended and expected air disaster victims to be compensated for a broad range of damages. No where in the text are there modifying adjectives such as "pecuniary" or its equivalent. Nothing in the drafting history or in subsequent commentator analysis suggests any intent to preclude damages for loss of society for the very real destruction of a close family relationship.

2. THE ORDINARY MEANING OF "DAMAGE"

The ordinary meaning of the English word "damage" confirms that it is broader than mere pecuniary loss.

The Oxford English Dictionary defines "damage" in the first instance as "loss or detriment caused by hurt or injury affecting estate, condition, or circumstances". IV The Oxford English Dictionary (2d ed., Clarendon Press) (1989).

Webster's New World Dictionary of the English Language (Warner, 1987) defines "damage" as "injury or harm resulting in a loss".

Similarly, the New Collegiate Dictionary (G.C. Merriam Co. 1977) defines "damage" as "loss or harm resulting from an injury to person, property or reputation."

Thus, ordinary usage of "damage" is not confined to pecuniary or financial detriment and permits recovery for injuries such as loss of society.

B. The History Of The Treaty

The Warsaw Convention was concluded on October 12, 1929 during the infancy of international air travel. The Convention established a fault-based system for air carrier liability with the burden placed upon the carrier to show lack of negligence by proving that all necessary measures to avoid the damage had been taken or that it was impossible to take such measures. *See* Article 20(1), Appx. A-1. The *quid pro quo* for the presumption of negligence was a monetary limit of liability per passenger of

approximately $8,300. *See generally* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967).

The Convention had several concurrent goals. Primary among them was to create a uniform system of liability rules that would cover all the hazards of air travel. *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (citing Sullivan, *The Codification of Air Carrier Liability By International Convention*, 7 J.Air. L. 1, 20 (1936)); Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J.Air. L. 217 (1959). Liability was not differentiated into recoveries disparate for those hazards occurring over land as opposed to those occurring over water.

Another goal of the Treaty was to provide the victims of injury with a basis for recovery and to compensate for those injuries. *Day, supra*, 528 F.2d at 37-38. Protecting air passengers and providing victims with full compensation remain fundamental aims of the Treaty today. *Id.* ("We conclude, in sum, that the protection of the passenger ranks high among the goals the Warsaw signatories now look to the Convention to serve.").

The Executive Branch of the Government has consistently focused on the compensatory aspects provided to the passenger in its support of the Treaty. In his transmittal of the Convention to the United States Senate, Secretary of State Cordell Hull stated:

> *It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery* and as tending to less litigation, but that it

> will also prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.
>
> *Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules,* Sen.Exec.Doc. No. G, 73rd Cong., 2d Sess. 3-4 (1934) (emphasis added).

Subsequent dissatisfaction with the low damage amounts, particularly in the United States, resulted in another convocation of delegates at The Hague, Netherlands in 1955 which concluded with The Hague Protocol.[7] Although never ratified by the Senate, the Executive Branch supported its adoption, largely because it provided greater compensation to victims. A letter from the Civil Aeronautics Board to the Senate Foreign Relations Committee in support of The Hague Protocol reads in pertinent part:

> The major benefits of the [Warsaw] convention to passengers, shippers and carriers arise from

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[7] The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air Signed at Warsaw on 12 October 1929, Sept. 1955, International Civil Aviation Organization Doc. 7686-LC/140, reprinted in L. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 265-274 (Martinus Nijhoff, 1988).

> the creation of *a uniform body of substantive aviation liability law, applicable regardless of the place of injury,* domicile of the passenger or shipper, or the nationality of the airline involved. *Not only are the rights of recovery for passengers in the event of personal injury or death both assured and provided for in the convention,* but the convention contains numerous provisions defining the respective rights of the consignor, consignee and carrier of air cargo, the legal effect of the air waybill, and provision for liability of the initial carrier in situations where the goods are shipped by several carriers. *These provisions of substantive law are applicable to all claims wherever and however brought,* and protect the claimant from provisions of foreign law or exemplary clauses in the ticket which tend to relieve the carrier from liability, fix a lower limit of liability from that provided for in the convention, or otherwise infringe upon the rules laid down by the convention.
>
> In the absence of the convention, a claimant could be subject to a maze of conflicting principles of conflicts of laws. The discovery and proof of appropriate law to be applied in cases where accidents occur in foreign jurisdictions presents one of the most difficult problems lawyers must face. The Hague Hearings at 20. (quoted in *Reed v. Wiser*, 555 F.2d 1079, 1091 (2d Cir. 1977)). (emphasis added).

After continued dissatisfaction with the Treaty, the United States denounced it.[8] In suggesting denunciation, Senator Robert Kennedy stated in August, 1965:

> Over two million Americans travel annually on international flights. *Assuring that they and their*

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[8] The United States subsequently withdrew the denunciation. *See generally, Lowenfeld* and *Mendelsohn, supra.*

> *families are adequately protected in case of accident is, consequently, a matter of widespread importance* . . . No one questions the fact that the protection now afforded international travelers is woefully inadequate.
>
> 111 Cong. Rec. 20164 (1965) (cited in *Day v. Trans World Airlines, Inc., supra,* 528 F.2d at 36.) (emphasis added)

Yet another goal of the Treaty was to prevent carriers from taking advantage of the monetary limit if the conduct causing the injury was particularly egregious or the equivalent of wilful misconduct. *See* Article 25, Appx. A-1-A-2. The drafters clearly intended to sanction a carrier for gross negligence or outrageous conduct and to permit the advantage of limited liability only for ordinary negligence. The deterrent purposes of the Treaty can only be achieved by subjecting a carrier guilty of wilful misconduct to a broad range of compensatory damages since punitive damages generally are held not to be an available sanction in Warsaw Convention cases. *See, In re Air Disaster at Lockerbie, Scotland on December 21, 1988,* 928 F.2d 1267 (2d Cir.), *cert. denied,* 502 U.S. 920 (1991); *In re Korean Air Lines Disaster, supra,* 932 F.2d at 1484-1490.

Lastly, another goal of the drafters of the Treaty was to establish a long-lasting document that would be sufficiently adaptable to meet the changing needs of future users of civil aviation.

> The Warsaw delegates knew that, in the years to come, civil aviation would change in ways that they could not have foreseen. They wished to design a system of air law that would be both durable and flexible enough to keep pace with these changes. *Day v. Trans World Airlines, supra,* 528 F.2d at 31.

The flexibility in the area of recoverable damages was achieved by deferring to the signatory nations application of and development of their respective substantive national law. As damages for torts evolved and expanded in common law countries, so too could the recoveries for Warsaw-based injuries be expanded, provided that the compensatory (for the passenger) and deterrent (for the carrier) goals were maintained.

C. The Drafters Intended National Substantive Law To Be Applied

Because the Treaty was intended to operate in a changing environment of civil aviation and because neither the civil law countries nor the common law countries wanted to compromise their philosophical approach to recoverable damages, the drafters referred detailed definitions to the substantive law of the signatory countries.[9]

While "damage sustained" was not defined by the Treaty, the *right* to recover actual damages remains within

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[9] As the Reporter of the Warsaw Convention stated on presenting his report to the conference,

> The question has arisen of whether it should be determined who are the persons who can bring an action in the event of death and what damages are subject to reparation. It has not been possible to find a satisfactory solution to this double problem and the C.I.T.E.J.A. [Comité International Technique d'Experts Juridiques Aeriens] has considered that this question of private international law should be regulated independently of the present convention. Minutes of IInd International Conference for Private Air Law, p.166.

the ambit of the Treaty such that its dual goals of compensation to the injured party and deterrence of wilful misconduct must be maintained. R. Mankiewicz, p.15. Therefore, a broad range of compensatory damages must be recoverable.

It is clear, however, that the drafters did *not* intend applicable law to depend solely on the locality of the accident. The drafters gave the injured passenger or his family a choice of fora in which to bring the action: the place of incorporation of the carrier, the principal place of business of the carrier, the place where the contract of carriage was made, and the place of the destination. *See* Article 28, Appx. p.A-2. They did not select as a proper forum the place the accident occurred as that place was considered to be purely fortuitous. *Mertens v. Flying Tiger Lines, Inc.*, 341 F.2d 851, 855 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). *Calkins, supra,* at p.231.

The forum court must look to the entire substantive law of the forum country to determine recoverable damages. The drafting history of the Treaty references national substantive law because the vast majority of the delegates were from federally unified countries. *See, e.g.*, D. Goedheus, *National Airlegislations and the Warsaw Convention*, 270 (1937) ("The question of whether the plaintiff has in fact a right of action, and if in the affirmative, the extent of the obligation to be indemnified, will be decided by the Court, using as basis the international private law in force for the court seized of the case"); M. Milde, *supra* at p.59 (references to "national law"); R. Mankiewicz, *supra* at p.160 (references to "applicable national law").

The applicable national law in the United States is federal common law and analogous state law since Congress has not defined the damages available in a Warsaw Convention cause of action. Use of federal common law is appropriate to address policy issues involving federal treaties with international implications. *See Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards" [citations omitted]); *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 641 (1981). Lower courts have used federal common law to interpret Warsaw Convention issues. *See Harris v. Polski Linie Lotniczne*, 820 F.2d 1000, 1003-04 (9th Cir. 1987); *In re Disaster at Lockerbie, Scotland on December 21, 1988, supra*, 928 F.2d at 1274-80; *Zicherman v. Korean Air Lines Co., Ltd., supra*, 43 F.3d at 21; *In re Disaster at Lockerbie, Scotland on December 21, 1988, supra*, 928 F.2d at 1274-80; *Zicherman v. Korean Air Lines Co., Ltd., supra*, 43 F.3d at 21; *In re Disaster at Lockerbie, Scotland on December 21, 1988*, 37 F.3d 804, 828 (2d Cir. 1994) ("Lockerbie II"); *see also, Corporacion Venezolana de Fomeato v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980) (approving the use of federal common law in specialized areas where jurisdiction is not based on diversity).

Federal common law principles allow for loss of society damages.

II. FEDERAL COMMON LAW SUPPORTS THE RIGHT TO RECOVER FOR LOSS OF SOCIETY

A. There Is A Federal Common Law Cause Of Action For Wrongful Death Which Permits Loss Of Society Damages

This Court has held that there is a federal common law right to recover for wrongful death in the context of

general maritime law. *Moragne v. States Marines Lines*, 398 U.S. 375 (1970). *Moragne* overruled *The Harrisburg*, 119 U.S. 199 (1886), in which this Court had refused to recognize a common law right of recovery for death. In reviewing the historical development of the denial of a common law right to recover for death, the *Moragne* Court implied that the denial was without genuine legal historical justification. 398 U.S. at 378-388. Although the *Moragne* Court stopped short of rewriting history and declined to decide that there had always existed a common law cause of action for death, it did identify a modern federal common law permitting recovery for wrongful deaths.

The federal common law was identified, in part, by acknowledging legislative innovations as statements of policy. *Id.*, 398 U.S. at 390. The Court observed that, since *The Harrisburg*, every state legislature has promulgated wrongful death statutes. The Court reasoned that the states' unanimous recognition of a wrongful death cause of action demonstrated that public policy favors recovery for wrongful death. *Id.* The *Moragne* Court's analytic procedure in identifying federal common law is instructive in the case *sub judice*. Since one method of defining federal common law is to refer to the policies as evidenced by the states' statutes and judicial decisions, *id.* at 408, they should be consulted to decide whether there is a public policy supporting loss of society damages. A clear majority of states permit recovery for loss of society damages. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 586 (1974) (hereinafter "Gaudet"); Speiser, Krause & Madole, *Recovery for Wrongful Death and Injury* 227-40 (3d Ed., Clark Boardman Callahan 1992). Thus, public policy

favors permitting recovery for loss of decedents' society in a federal common law wrongful death action.[10]

This Court in *Moragne* also considered whether Congress had precluded judicial action in identifying federal common law remedies for death. It noted that Congress' enactments of The Death On The High Seas Act (DOHSA)[11] and The Jones Act[12] were not affirmative indications of an intention to preclude judicial allowance of a federal common law wrongful death action.

Loss of society damages in the case of a death are akin to damages for loss of society suffered by a family member in non-fatal personal injury cases. In *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), this Court identified the right to recover loss of society damages resulting from non-fatal injuries in a general maritime law context. Again recognizing that federal common law is not stagnant but evolves as public policies change, the Court acknowledged that a clear majority of states (forty-one states and the District of Columbia) permit a spouse to recover for loss of consortium resulting from non-fatal injuries to the other spouse. 446 U.S. at 284, n. 11. As regards injuries suffered by a close family member as a

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[10] In recent proceedings in Congress, bills were introduced to limit certain remedies in products liability cases. Although there had been proposals to limit non-pecuniary damages, neither the bill passed by the House nor the bill passed by the Senate limits recovery of non-pecuniary damages, suggesting that public policy favors the recovery of all actual damages without artificial limitations. *See*, H.R. 956, 104th Cong., 1st Sess. (1995).

[11] 41 Stat. 537, 46 U.S.C. §§761-67 (1988).

[12] 41 Stat. 1007, 46 U.S.C. §688 (1988).

result of harm done to a loved one, there is no rational basis for drawing a distinction between fatal and non-fatal injuries. 446 U.S. at 286 (Powell, J. dissenting).

In the case of non-fatal injuries, the relationship between the injured party and a close family member is adversely affected and negatively disrupted. In the case of a death, the relationship is destroyed and the harm is greater. It would be logically inconsistent to compensate the lesser of the damage but to deny recovery for the greater.

Similarly, even in actions under DOHSA, courts have recognized that loss of parental nurture has a value such that damages for that loss are recoverable. *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 81 (9th Cir. 1983); *Soloman v. Warren*, 540 F.2d 777, 788 (5th Cir. 1976), *reh. denied*, 545 F.2d 1298, *cert. dismissed sub nom.; Warren v. Serody*, 434 U.S. 801 (1977); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 593 n. 9a (2d Cir. 1961), *cert. denied*, 368 U.S. 989, *reh. denied*, 370 U.S. 965 (1962). Inherent in the allowance of such damages is the recognition of the value, tangible and intangible, that exists in the parent-child relationship. There is no logical reason to differentiate between the loss to a child of a parent and loss to a parent of a child. Indeed, it cannot be disputed that there is no greater loss than the death of a child to a parent who has not only contributed heredity to a child but who has contributed his or her own morals, culture, aspirations, and beliefs. Acknowledging compensation for the destruction of that relationship with loss of society damages advances societal affirmation of family values.

B. Financial Dependency Is Not A Prerequisite To Recover Loss Of Society Damages Under The Warsaw Convention

The Second Circuit has held that loss of society damages are only available to dependent spouses and children under the Warsaw wrongful death cause of action. *Lockerbie II*, 37 F.3d at 829-30; *Zicherman*, 43 F.3d at 22. The Second Circuit rationalized the dependency requirement by analogizing the Treaty wrongful death action to federal maritime law. This analogy is improper given the goals of the Treaty to simultaneously compensate for injury and to deter a carrier's wilful misconduct, necessitating a broad range of recoverable damages. Nowhere in the text of the treaty do the words "pecuniary" or "dependents", or their equivalents, appear. The goals inherent in the Treaty are different than the purposes for which maritime law evolved. It is the Treaty's unique goals that must be effectuated; they are not with the Second Circuit's approach.

Even in general maritime cases, the distinction between dependent and non-dependent sufferers of loss of society is questionable. *See, e.g., Sutton v. Earles*, 26 F. 3d 903, 917 (9th Cir. 1994) (noting that this Court described *Gaudet* claimants as "survivors", not "dependents", in *Mobile Oil Corp. v. Higgenbotham*, 436 U.S. 618, 622 and n. 15 (1978)).

Moreover, it is contrary to human experience to condition compensation for the sudden loss of a beloved family member to a dependency requirement. Conditioning recovery on dependency is particularly illogical in

cases where the loss was due to the carrier's wilful misconduct, e.g., a deliberate failure to take steps necessary for safety. *See American Airlines v. Ulen*, 186 F.2d 529, 533 (D.C. Cir. 1949). *KLM v. Tuller*, 292 F.2d 775, 778 (D.C. Cir. 1961). If the dependency requirement is upheld, it will deny recovery in most circumstances to, e.g., parents whose children, minor and adult, are killed and to adult children for the loss of a beloved parent with whom they maintain a close relationship. There are innumerable permutations of modern family circumstances in which the destruction of a relationship with a non-dependent family member would be a devastating loss. Yet, under the Second Circuit's approach, an air carrier would not be held accountable even though the death was caused by its deplorable acts. Such a result would be intolerable to the traveling public and to the ends of justice.

III. THE COURT IS NOT CONSTRAINED BY MARITIME DECISIONS AND STATUTES IN THESE WARSAW CONVENTION ACTIONS

In the courts below, Respondent KAL argued that where a death covered by the Warsaw Convention occurs on the high seas, the forum court must apply DOHSA as governing substantive law. KAL's position would unquestionably lead to application of different damages standards depending on whether the accident was land-based or sea-based. The drafters of the Treaty, however, contemplated application of the general substantive national law of the court seized of the case, not domestic fragmentations based solely on the accident locality. While the drafters were willing to tolerate some disparity in recoveries because of historic differences between civil

law and the common law, there is no hint in the Minutes or from commentators that further differentiation by political subdivision or accident locale was anticipated. *See, e.g., Mertens v. Flying Tiger Lines, supra,* 341 F.2d at 855; *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (3d Cir. 1966) (for Article 28 venue purposes, the High Contracting Party as a nation-state, not political subdivisions, is considered).

As the Warsaw cause of action was intended to be a uniform remedy for injuries and deaths caused in international air transportation, it would be inconsistent to have the forum courts in this country apply different measures of damages depending on whether the aircraft crashed on land or in the sea.

Nor is this Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) applicable to these Warsaw Convention death actions. *Miles* denied loss of society damages to the non-dependent parent for the death of a Jones Act seaman. 498 U.S. at 32-33. In doing so, the Court acknowledged Congress' intent to incorporate the substantive recovery provisions of the Federal Employees Liability Act (FELA)[13], which had long been defined as providing recovery for pecuniary loss only, into The Jones Act. But, unlike The Jones Act, Warsaw was ratified without discussion or debate. It cannot be assumed that Congress intended that recovery would be for pecuniary loss only, because there are no references to "pecuniary", or its equivalent, in the text of the Treaty. Moreover, as

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[13] Federal Employees Liability Act, 46 U.S.C. §§674-77 (1988).

Warsaw was clearly designed to govern deaths that occurred on land as well as on water, it cannot be assumed that Congress intended to reference maritime law as a guide to Warsaw's "damage sustained".

Furthermore, Treaty provisions which create domestic law, as does the Warsaw Convention, supersede pre-existing conflicting legislation. *In re Air Crash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1307-08 (9th Cir. 1982); *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100 (D.C. Cir. 1988). Thus, the Treaty's cause of action and its attendant remedies displace the cause of action created by DOHSA or The Jones Act for maritime deaths.

Likewise, the Court is not constrained by general maritime law in defining available damages in the Treaty cause of action. Instead, it must develop standards applicable to both land-based and sea-based deaths that occur in international air transportation by acknowledging the independent cause of action created by the Warsaw Convention and defining the applicable damages as including loss of society unfettered by a dependency requirement. In doing so, it will finally resolve the tortuous history of analysis as to whether the Treaty creates an independent cause of action applicable to all damage sustained in international air transportation. *See, e.g., In re Mexico City Air Crash of October 31, 1979, supra*, 708 F.2d at 409-16. The result can only be achieved by reference to the goals of the Treaty itself, not to any singular body of law, such as maritime law, which has no relationship to the unique purposes of the Treaty.

CONCLUSION

The Warsaw Convention cause of action creates a remedy for wrongful death which unconditionally includes damages for loss of society upon a showing of reasonably reliable evidence of the relationship that was destroyed. Such a finding is consistent with the goals of the Treaty to provide broad recovery for "damage sustained" and to preclude a carrier which has committed deplorable acts from benefiting from its wilful misconduct. Such a finding is also consistent with federal common law which recognizes recovery for loss of society. And such a finding judicially acknowledges the value of familial relationships and the interdependence of family members who provide emotional support for each other. The Second Circuit decision regarding loss of society damages should be reversed to the extent it conditions loss of society damages on financial dependency.

Dated:

Respectfully submitted

SPEISER, KRAUSE, MADOLE & COOK

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APPENDIX

ARTICLE 17

The carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

ARTICLE 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid damage.

ARTICLE 25

(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself to the said provisions if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

ARTICLE 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the Court at the place of destination.

(2) Questions of procedure shall be governed by the law of the Court to which the case is submitted.

(7)

No. 94-1361

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, individually and as executrix of the estate of Muriel A.M.S. Kole, and Muriel Mahalek,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF PLAINTIFFS' COMMITTEE IN *IN RE AIR CRASH DISASTER AT LOCKERBIE, SCOTLAND*, IN SUPPORT OF PETITIONERS

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Questions Presented

1. Under the Warsaw Convention, must a parent, spouse, child or sibling demonstrate financial dependence on a decedent in order to recover damages for the loss of society he or she sustained?

2. Under Article 17 of the Warsaw Convention, Does "Damage Sustained" include loss of society?

3. Does the Death on the High Seas Act apply in a Warsaw Convention case?

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Consent of Parties

Both parties have consented to the filing of this amicus brief by letters that are filed herewith.

Interest of the Amicus Curiae

The plaintiffs' committee in *In re Lockerbie Air Disaster*, E.D.N.Y. (MDL 799), hereby submits this brief amicus curiae in support of the position of the petitioners that in Warsaw Convention[1] death cases, federal common law permits a decedent's survivor to recover for loss of society, whether or not that survivor was financially dependent on the decedent, and whether or not the accident occurred on the high seas.

Amicus Curiae's interest arises from the fact that there are still 150 Lockerbie cases pending where the loss of society damages suffered is an important component of the family's loss. Indeed, approximately 100 of the remaining cases are brought by parents for the deaths of their children (primarily college students), wherein parental loss of society is the primary element of the damages they sustained.

Statement of the Case as it Relates to the Lockerbie Litigation

It was in our *Lockerbie* litigation that the Second Circuit Court of Appeals first held that the Warsaw Convention cause of action was exclusive and that federal common law supplies its standard of damages. *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) (hereafter referred to as "*Lockerbie I*"). It was also in our case that the court of appeals first held that loss of society damages can only be recovered if the family member also suffered a loss of financial contributions. *In re Air Disaster at Lockerbie, Scotland*, 37 F.3d 804 (2d Cir.) (revised opinion, generally called "*Lockerbie II.*"), *cert. denied*, 115 S.Ct. 934 (1995).

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, entered into force in the United States on October 29, 1934. 49 Stat. 3000; 49 U.S.C.App. § 1502.

The Lockerbie litigation arose after Pan American World Airways Flight 103 exploded over Lockerbie, Scotland on December 21, 1988. Subsequently, over 200 wrongful death actions were brought by the victims' survivors, against Pan Am and its security subsidiary, Alert Management Systems, Inc. The Judicial Panel on Multidistrict Litigation consolidated those actions before Chief Judge Thomas C. Platt of the Eastern District of New York.

After over three years of discovery, a three month consolidated liability trial resulted in a jury finding that Pan Am's wilful misconduct was a proximate cause of the Flight 103 disaster. The District Court entered judgments after three exemplar damages trials in which loss of society damages were awarded. On appeal by Pan Am, a panel of the Second Circuit affirmed liability and allowed loss of society damages. In a modified opinion, the court limited such damages to cases of financial dependency. That decision was followed and amplified by the court of appeals in the instant case, below.

Summary of Argument

The decision of the court below in this case and in *Lockerbie II*, that damages for loss of society are limited to cases of financial dependency, is neither logical nor sensible. Financial dependency is irrelevant to the question of loss of society resulting from the death of a family member.

Even in General Maritime Law, no such distinction is warranted. Those admiralty cases that articulate such a rule base it on the need for uniformity with cases under federal statutes such as the Jones Act and Death on the High Seas Act, when this Court has explicitly denied that such a need exists. In any event, those statutes are applicable to admiralty only and are at diametric variance with the standard of the Warsaw Convention that "damage sustained" be awarded when wilful misconduct has been found. There is no need to

import the tortured law of admiralty into Warsaw Convention actions.

The language and drafting history of the Convention indicates an intent to permit a broad range of damages in accord with French civil law. Federal common law implementing the Warsaw Convention should reflect the intent of the convention's drafters and permit the recovery of non-pecuniary losses including loss of society.

Moreover, the primary reference for federal common law is state law. The vast majority of states allow for a recovery of loss of society damages, without reference to dependency. So do lower federal courts in civil rights actions. This Court's own General Maritime Law decisions have provided for loss of society recoveries in cases outside the ambit of the Death on the High Seas Act (DOHSA) and the Jones Act.

DOHSA, the Jones Act and the Federal Employer's Liability Act are inappropriate references for federal common law, particularly when construing the "damage sustained" language of the Warsaw Convention, because they apply to a narrow class of decedents and a limited geography.

The Death on the High Seas Act can not supply the governing law as to damages in any Warsaw Convention case. The Convention is federal law on a par with DOHSA and it preempts DOHSA when the two are in conflict, because the Convention was more recently enacted and more specifically addresses aviation accident cases.

Argument

I

DAMAGES FOR LOSS OF SOCIETY SHOULD NOT BE CONDITIONED ON PROOF OF DEPENDENCY

A. The Financial Dependency Standard is Irrelevant to Loss of Society Damages

The dependency condition articulated by the Second Circuit is illogical, particularly because Article 17 of the Warsaw Convention allows recovery of "damage sustained." A family member who has suffered a profound loss of society and companionship may have been financially dependent on the decedent, may have had no financial support at all, or may have been a financial provider to the decedent (e.g. a parent or working spouse). To condition legal recognition of a loss of society on proof that money flowed from one family member to another lacks any rational basis and imposes a harsh and arbitrary result on those who can not satisfy the irrelevant condition.

Even the Second Circuit court of appeals has admitted that loss of society is a matter that bears no relation to pecuniary loss. *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1092 (2d Cir.), *cert. denied*, 114 S.Ct. 1060 (1994).

Placing this rule in a practical context best demonstrates its absurdity. Consider a loving but childless couple in which the husband earns a substantial income, such that the family hires employees to cook and clean and otherwise run the household, while the wife engages in charitable endeavors. If the wife were to suffer a wrongful death, a jury may very well conclude that the husband was not financially dependent on her, and notwithstanding their close relationship he could not recover loss of society under the dependency test established below.

Similarly, to the parents of college-age students who died on Pan Am Flight 103, the dependency requirement estab-

lished below lacks rationality. They face denial of loss of society damages, simply because their children did not live long enough to assist them financially in their old age.[2]

The harshness of this rule could be remedied by holding that loss of society is always recoverable for the death of a spouse, parent, or child, but this answer simply proves the point: the classification adopted below is irrational, unfair, and unrealistic. An opportunity to prove entitlement should be afforded to all with a close enough family relationship to the decedent to merit recognition of the loss as a matter of law.

Such was the holding recently by Judge Robinson in *Maikovich v. Korean Air Lines Co., Ltd.*, No. 83-3792 (D.D.C. November 14, 1994):

> [I]n the interest of uniformity, the Second Circuit has explicitly taken the position that damages under the Warsaw Convention shall be governed by general maritime law, which prohibits loss of society damages absent a showing of dependency. *Zicherman*.
>
> In prior opinions addressing loss of society damages, this Court has held that the Warsaw Convention permits recovery for loss of society, so long as a claimant presents sufficient evidence of a relationship with a decedent from which a jury could find that a loss of society has occurred. Although KAL, prior to the Second Circuit's opinion in *Zicherman*, argued that loss of society damages should be available to only the dependent of a decedent, this Court refused to impose such a limitation because of the Court's view that the intent of the drafters

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[2] The dependency rule is especially perverse in this situation because if there is any relationship between financial dependency and loss of society in a parent-child relationship, it is inverse. The loss of society is greatest when the child lives at home, but the parent is most likely to receive financial assistance from the child long after the child leaves home. Thus, the parents have no claim for loss of society when their loss of society would be greatest, but obtain a claim when their loss of society is less acute.

> of the Warsaw Convention was to provide broadly for damages sustained. In a similar vein, this Court declines to adopt the position taken by the Second Circuit in *Zicherman* that general maritime law governs the types of damages recoverable under the Warsaw Convention because such an approach, while adopted in part to foster the worthy goal of uniformity, fails to give adequate consideration to the intent of the drafters of the Convention or to the Convention's underlying purposes.

Slip. op. at 11-13.

B. Under the General Maritime Law, Loss of Society Damages are awarded without restriction based on dependency

Even under the General Maritime Law, it is not proper to limit loss of society damages to financial dependents.

In 1970, this Court recognized a wrongful death cause of action under the General Maritime Law. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). Subsequently, this Court held that loss of society damages are recoverable in *Moragne* actions, for longshoremen in territorial waters. *Sea-Land Services v. Gaudet*, 414 U.S. 573, 585-90 (1974). The *Gaudet* court placed great emphasis on consistency with prevailing state rules, regardless of any inconsistency with other federal maritime remedies. 414 U.S. at 587, 591.

Notwithstanding what appears to have been a clear statement by this Court in *Gaudet*, several lower federal courts have grafted a dependency condition upon it, reasoning that uniformity with the DOHSA and the Jones Act compel that result. *E.g. Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084, 1092 (2d Cir.), *cert. denied*, 114 S.Ct. 1060 (1994). That reasoning is inconsistent with this Court's decision in *Gaudet*, and with Congressional intent behind the DOHSA.

In *Gaudet*, this Court explicitly acknowledged that permitting a recovery for loss of society under the General Mar-

itime Law created an inconsistency with the law under the Death on the High Seas Act, but found that uniformity was obviously not Congress' intent:

> We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act. Traditionally, however, "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). The scope and content of the general maritime remedy for wrongful death established in Moragne is no exception. . . . . Congress' insistence that the [Death on the High Seas] Act not extend to territorial waters . . . indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful-death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act.

414 U.S. at 588 n. 22.

Several courts have recognized the error in attempting to impose uniformity upon a complex of laws that this Court has chosen to leave divergent. Most recently, in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), the Court of Appeals noted that this Court in *Gaudet* "recognized that it was permitting recovery for damages that were not compensable under the Death on the High Seas Act," 26 F.3d at 915, and noted that this Court also recognized and accepted non-uniformity in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), *Id.*, but nevertheless "left the law applicable to territorial-water *Moragne* actions where it found it." 26 F.3d at 916. Thus, the *Sutton* court found any reliance on a goal of uniformity to be neither commanded nor permitted by this Court's jurisprudence:

> We do not consider ourselves free to give such weight to the interest of uniformity in light of *Gaudet*'s explicit acknowledgment that it was creating a non-uniform cat-

> egory of damages in territorial waters and the acknowledgments of non-uniformity in *Higginbotham*. The fact that the death of a seaman in territorial waters leads to recovery only of pecuniary damages is dictated by statute . . . and that statute does not limit recoveries for the deaths of non-seamen.

26 F.3d at 917 (citations omitted).[3] *See also Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 636-37 (3d Cir. 1994) (noting that uniformity has not dictated this Court's prior holdings in maritime death actions), *cert. granted*, 63 U.S.L.W. 3644 (1995)

The *Sutton* court went on to hold:

> We decline, therefore, to limit Gaudet by drawing an unnecessary distinction between dependent and nondependent parent plaintiffs in Moragne actions for determining the availability of loss-of-society damages. As the Court noted in Moragne, "it better becomes the humane and liberal character of proceedings to admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." Moragne, 398 U.S. at 387, 90 S.Ct. at 1781 (quoting The Sea Gull, 21 F.Cas. 909, 910 (No. 12, 578) (C.C.Md.1865)). Any lack of uniformity that is evidenced by our ruling inheres in the decision of the Supreme Court in Gaudet and in the actions of Congress in enacting DOHSA and the Jones Act. We are in no position to disregard or modify either of those authorities, even if we were of such a mind. We therefore affirm the district court's award of loss-of-society damages without regard to dependency.

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[3] The *Sutton* court noted that the absence of a dependency requirement will not open up loss of society damages to any person who claims them, since in *Moragne* this Court instructed the lower courts to use DOHSA as a guide, 26 F.3d at 916, and federal courts have consequently followed the DOHSA beneficiary schedule to limit claims to the spouse, children, parents and dependent relatives of the deceased. *Id.*

26 F.3d at 917. *See also Randall v. Chevron USA, Inc.*, 13 F.3d. 888, 903 (5th Cir.) (stating, "In our view, the law of this circuit does not unequivocally limit recovery of loss of society damages for the wrongful death of a parent to children who are financially dependent on the deceased parent."), *cert. denied*, 115 S.Ct. 498 (1995).

In sum, the holding below misinterprets General Maritime Law. Perhaps more importantly, it disregards the compensatory purposes of the Warsaw Convention by unnecessarily borrowing from General Maritime Law an arbitrary and irrational restriction on recovery. That error is made apparent by examining more fundamental considerations in the development of federal common law under the Warsaw Convention.

II

"DAMAGE SUSTAINED" INCLUDES COMPENSATION FOR LOSS OF SOCIETY

A. The Language and Drafting History of the Convention Indicates an Intent to Permit a Broad Range of Damages in Accord with French civil law

The matter before this Court raises two subsidiary questions: what measure of damages does Article 17 of the Warsaw Convention permit, and what should federal common law, implementing Article 17, provide for?

There is virtual unanimity that Article 17 was intended to permit the broadest possible recovery of damages. The phrase "damage sustained" ("dommage survenu") in Article 17 rules out any argument that the Convention only allows a recovery for pecuniary damages. L. Goldhirsch, *The Warsaw Convention Annotated*, 58 (Nijhoff; Dordrecht 1988) (citing *Preston v. Hunting Air Transport*, 1 QB 454 (1956)).

Lower federal courts have regularly held that Article 17 allows a recovery of all elements of damage suffered by the survivors of an aircraft accident. *Lockerbie II*, 37 F.3d at 829;

In re Korean Air Lines Disaster, 932 F.2d 1475, 1485, 1487 (D.C. Cir.) (Article 17 permits compensation for "monetary or other loss to . . . survivors"), *cert. denied*, 502 U.S. 994 (1991); *Lockerbie I*, 928 F.2d at 1282, 1285-86 (Article 17 contemplates an award of "full compensatory damages", including 'moral damages' under civil law); *In re Air Crash Disaster at New Orleans*, 789 F.2d 1092 (5th Cir.) (affirming recovery for "loss of love and affection" under Louisiana law in Warsaw Convention action), *vacated on other grounds*, 490 U.S. 1032 (1989).

B. Federal Common Law Implementing the Warsaw Convention Should Reflect the Intent of the Convention's Drafters and Permit the Recovery of Non-Pecuniary Losses including Loss of Society.

The Convention's drafters left damages issues to the law of the forum court. Article 24(2). *In re Korean Air Lines Disaster*, 932 F.2d at 1488; *Lockerbie I*, 928 F.2d at 1283 (stating, "Commentators and case law are in accord that the Convention leaves the measure of damages to the internal law of parties to the Convention.").

Notwithstanding this, in articulating the internal law of the United States, the Court of Appeals for the Second Circuit was free to honor the Convention's goal of international uniformity. *See Lockerbie I*, 928 F.2d at 1278. The difficulty with the decision below lies in its misdefining the "uniformity" contemplated by the Warsaw Convention's drafters.

The drafters of the Warsaw Convention sought uniformity in air law on an international level. The Convention "was intended to serve as a uniform, international law." *Lockerbie I*, 928 F.2d at 1280 (citing *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir.), *cert. denied*, 392 U.S. 905 (1968)). The *Lockerbie I* court ruled that punitive damages were unavailable in Convention cases, at least in part because other nations follow that rule. 928 F.2d at 1287. *See also In re Korean Air Lines Disaster*, 932 F.2d at 1485, 1487. In *Eastern Air Lines, Inc. v. Floyd*, 499 U.S. 530 (1991) this Court expressly stated its intent to rule in accordance

with "the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation." 499 U.S. at 552.

The uniformity sought by the court below was not the uniformity envisioned by the Convention's drafters, by this Court, or even by the earlier Second Circuit panel in *Lockerbie I*. The panel below sought to make damages law under the Convention consistent with United States federal common law in maritime cases, 43 F.3d at 21-23, but the drafters of the Convention clearly did not envision uniformity of that sort.[4]

The first reference below should have been to the Convention itself. *Compare Butler v. Aeromexico*, 774 F.2d 429, 431 (9th Cir. 1985) (district court's refusal to apply Alabama damages law in Convention death case was proper, because Alabama law only provided for punitive damages in death cases, and this conflicts with the compensatory tenor of the Convention.).

As this Court has noted previously, the terms of French civil law are critical in understanding the Convention. It was drafted in French by delegates from several civil law jurisdictions. *Air France v. Saks*, 470 U.S. 392, 399-400 (1985); *See also Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 536 (1991). Civil law awarded damages equivalent to loss of society and companionship for nearly a century before the Warsaw Convention was drafted. Tunc & McGregor, International Encyclopedia of Comparative Law, Vol. XI, Chapter 9 pp. 16-17 (moral damages, a survivor's loss of society and companionship, date back to 1833 in France, 1881 in Belgium,

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[4] The drafters could not have contemplated any issue arising out of the U.S. legal system, as no U.S. delegate was among them. The U.S. only sent observers. *Lockerbie I*, 928 F.2d at 1271.

In addition, when it ratified the Warsaw Convention in 1934, it would have been impossible for Congress to contemplate that General Maritime Law for death actions could be applied. There was no cause of action for wrongful death under the General Maritime Law until this Court decided *Moragne* in 1970.

and 1912 in Spain); *see also* G. Miller, *Liability in International Air Transport*, pp. 112-115 (Kluwer, The Netherlands 1977).

Professor George Ripert[5] explicitly noted during the drafting process that under French law, the survivors of decedents were entitled to moral as well as pecuniary damages. Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 Air Law Review 26, 49-50. In *Floyd*, this Court acknowledged the recoverability of moral damages under French law. 499 U.S. at 539.

The law is not dissimilar in common law nations. The Australian Civil Aviation (Carrier's Liability) Act 1959-1973, Section 12(8), states that in Warsaw Convention death cases, "In awarding damages, the court or jury is not limited to the financial loss resulting from the death of the passenger." Similarly, in England the Fatal Accidents Act 1976, as amended, governs recoveries in Warsaw Convention death actions pursuant to the Carriage by Air Act 1961. It allows a limited claim for bereavement by the decedent's spouse or by parents in the case of unmarried decedents.

C. The Convention's General Intent to Limit the Carrier's Liability Does Not Apply to Cases Where There Has Been a Finding of Wilful Misconduct.

In both the instant case and the Lockerbie litigation, the Convention's general purpose of limiting carrier liability does not pertain. Unlike this Court's decisions in *Saks* and *Floyd*, both the instant case and *Lockerbie* involve jury findings of wilful misconduct by the carriers.[6] In such cases, the drafters

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[5] This Court has previously noted that Professor Ripert was a leading French delegate responsible for the drafting of the Warsaw Convention. *See Floyd*, 499 U.S. at 543 n. 9.

[6] *Saks* and *Floyd* involved an ear injury and emotional distress, respectively. Both were brought under the Montreal agreement in which carriers waived their "due care" defenses under Article 20 of the Convention. *See Floyd*, 499 U.S. at 552. Accordingly, not even negligence had been proven, let alone wilful misconduct. In *Floyd* this Court

of the Convention set out to deny the carriers any limitation or exclusion of liability:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

Article 25(1).

The broad language of this article implicates more than the limits to carrier liability found in Article 22. Article 25(1) ensures that a carrier is fully liable for all harm that results from its wilful misconduct. *Compare In re Korean Air Lines Disaster*, 932 F.2d at 1493 (Mikva, dissenting in part, and stating that "the original language of Article 25 does not suggest that only Article 22 was covered . . ."). Thus, it would be improper to allow the Convention's general purpose of limiting liability to affect any formulation of the damages recoverable when wilful misconduct is proven.[7] That measure

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expressly stated that in light of the Convention's purpose of limiting carrier liability, it was reluctant to subject carriers to "*strict* liability for purely mental distress." 499 U.S. at 552 (emphasis supplied). These considerations have no bearing here.

[7] Wilful misconduct cases are rare. Excluding the instant case and *Lockerbie*, Amicus knows of only six aircraft disaster cases in the sixty one year history of the Warsaw Convention in which the carriers were found guilty of wilful misconduct. *See In re Air Crash in Bali, Indonesia*, 871 F.2d 812 (9th Cir.), *cert. denied*, 493 U.S. 917 (1989); *Butler v. Aeromexico*, 774 F.2d 429 (9th Cir. 1985); *Leroy v. Sabena World Airways*, 344 F.2d 266 (2d Cir.), *cert. denied*, 382 U.S. 878 (1965); *KLM v. Tuller*, 292 F.2d 775 (D.C.Cir.), *cert. denied*, 368 U.S. 921 (1961); *American Airlines v. Ulen*, 186 F.2d 259 (D.C. Cir. 1949). A judgment that has not been reported in a published opinion was entered on a jury finding of wilful misconduct in *In re Pago Pago Aircrash of January 30, 1974*, 419 F.Supp. 1158 (C.D. Cal. 1976).

Lower federal courts have not been hesitant to preclude wilful misconduct findings by pretrial motions, or to reverse them after trial, based on insufficiency of the evidence. *See Ospina v. Trans World Airlines*,

of damages must be as full and as complete as local law permits, consistent with the intent of the drafters of the Convention.[8]

D. Even as a Strict Federal Common Law Matter, The Proper Rule is to Allow Loss of Society

1. Federal Common Law Must Reflect Modern Trends and Standards Set Forth in State Law.

The court below stated that "federal maritime law supplies the measure of damages for injuries arising out of accidents governed by the Warsaw Convention." *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18, 23 (2d Cir. 1994). This reference to one exclusive source is not a proper formulation of federal common law, in any context. In particular, the borrowing from admiralty law of a dependency requirement for loss of society damages is inconsistent with the broad compensatory intent of Article 17 of the Convention.

In *Consolidated Rail Corp. v. Gotshall*, 114 S.Ct. 2396 (1994), this Court recognized a FELA cause of action for negligent infliction of emotional distress. Concurring, Justice Souter noted that in developing federal common law for FELA cases, this Court must be:

> informed by reference to the evolving common law. As we have explained:

Inc., 975 F.2d 35 (2d Cir.) (reversing judgment in accordance with finding of wilful misconduct), *cert. denied*, 113 S.Ct. 1944 (1993); *Confeccoes Texteis de Vouzela, LDA v. Space Tech Systems Inc.*, 972 F.2d 1338 (Table: Text at 1992 WL 170964) (9th Cir. 1992) (affirming District Court's granting of summary judgment for defendant).

[8] Especially in death cases, the elements of damages recoverable under Article 17 will have practical importance only when a carrier has been adjudged liable for wilful misconduct under Article 25. This Court has already noted that even when the Convention was adopted, the monetary cap was low. *Floyd*, 499 U.S. at 546. Today, the $75,000 cap set in the Montreal Agreement limits a carrier's liability to an amount far below even a strict peculiarly loss recovery for wrongful death.

> [I]nstead of a detailed statute codifying common law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers . . . and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers. *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958).

114 S.Ct. at 2412.

Justice Souter's comment has as much application to Warsaw Convention jurisprudence as it does to FELA Like FELA, the Convention is written in "general terms," and thus leaves to courts the duty of fashioning remedies in a manner analogous to common law.[9] The primary reference to common law that this Court turned to in *Gotshall* was state common law. 114 S.Ct. at 2405-08. In addressing loss of society damages under the Warsaw Convention, the development of the common law by state legislatures and courts should similarly guide the federal courts.

In one of the first decisions addressing the substance of federal common law under the Warsaw Convention, Judge Weinstein placed primary and substantial reliance on the clear consensus formed by state laws. *In re Inflight Explosion on Trans World Airlines, Inc. Aircraft*, 778 F. Supp. 625, 631-32 (E.D.N.Y. 1991), *rev'd on other grounds sub nom Ospina v. Trans World Airlines, Inc.*, 975 F.3d 35 (2d Cir.) , *cert. denied*, 113 S.Ct. 1944 (1993).

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[9] However, F.E.L.A. is not a good substantive reference for Warsaw Convention cases because it is limited to actions for death or injury to employees. Therefore, Congress clearly did not anticipate its application to a broad range of victims, including children.

Judge Weinstein reasoned:

> If possible, federal common law tort jurisprudence should be consistent with that developed by the states. . . . The federal courts . . . . need not reinvent an old wheel.

778 F. Supp. at 632. Indeed, this Court has consistently referred to state law in developing General Maritime Law. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986); *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980).

2. Recognition of a Loss of Society Claim Under the Warsaw Convention is the Only Fair Result in Light of the Overwhelming Majority of States Which Provide for Such a Recovery

Forty four states provide damages in death actions for the loss of a decedent's society or companionship, or for similar damages such as loss of spousal consortium.[10] One recent

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[10] Alaska, Alaska Stat. § 09.55.580(c)(4) (for decedents survived by spouse, children or other dependent survivors, death damages include those for loss of consortium); *Gillispie v. Beta Construction Co.*, 842 P.2d 1272 (Alaska 1992) (parents have loss of society claim for death of child under Alaska Stat. § 9.15.010).

Arizona, *City of Tuscon v. Wondergem*, 466 P.2d 383, 387 (Az. 1970) (damages under death statute include recovery for loss of companionship, comfort and guidance).

Arkansas, Ark.Stat.Ann. § 16-62-102(f) (damages for pecuniary loss include spousal loss of companionship).

California, *Fox v. Pacific Southwest Airlines*, 184 Cal.Rptr. 87, 89 (Cal. App. 1982) (plaintiffs may recover the pecuniary value of such factors as lost comfort, society, companionship, care and protection).

Colorado, Colo. Rev. Stat. § 13-21-203 (damages include noneconomic losses including grief and loss of companionship).

Connecticut, Conn. Gen. Stat. § 52-555a (creating spousal claim for loss of consortium in addition to general loss to estate death statute at Conn. Gen. Stat. § 52-555).

(*Footnote continued*)

commentary on this issue identified no state law statute or holding which conditions an award of loss of society on proof

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Delaware, Del. Code Ann. § 3724(d)(5) (no loss of society but mental anguish is allowed).

Florida, Fla. Stat. Ann. § 768.21 (spouse and minor children may recover for loss of companionship and mental pain and suffering, and parents of deceased minor children or single adult children may recover for mental pain and suffering).

Hawaii, H.R.S. § 663-3 (death damages include lose of love and affection, loss of society, companionship, comfort and consortium suffered by spouse, children or parents of deceased).

Idaho, *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982) (parents may claim for loss of comfort, society and companionship of deceased child).

Illinois, *Hall v. Gillins*, 147 N.E.2d 352 (Ill. 1958) (pecuniary losses under statute include loss of companionship, love and affection).

Indiana, *State v. Bouras*, 423 N.E.2d 741, 746 (In. App. 1981) (loss of care, love and affection recoverable by widow, dependent children or dependent next of kin).

Iowa, *Haafke v. Mitchell*, 347 N.W.2d 381, 389 (Iowa 1984) (claim for loss of society, care and attention of spouse or parent); *Audobon-Exira Ready Mix, Inc. v. Illinois Central Gulf R.R. Co.*, 335 N.W.2d 148, 150 (Iowa 1983) (parent's loss of services, companionship and society of child recoverable under Civil Rule).

Kansas, Kan. Stat. Ann. § 60-1903, 1904 (damages are recoverable for loss of society, companionship, comfort and protection and other non-pecuniary losses, capped at $100,000 per case).

Kentucky, Ky. Rev. Stat. Ann. §§ 411.135, 145 (parents may recover for loss of affection and companionship of minor and spouses may recover for loss of consortium, including loss of society and companionship).

Louisiana, La. Civ. Code Ann. art. 2315 (damages may include loss of consortium, service and society).

Maine, Me. Rev. Stat. Ann. title 18-A, § 2-804 (death damages include up to $75,000 for loss of comfort, companionship and society).

Maryland, Md. Cts. & Jud. Proc. Code Ann. § 3-904 (loss of society and companionship available to plaintiffs who survive a spouse, a child under 21, a parent of a minor child, or an unmarried dependent adult child).

Massachusetts, G.L. c. 229, § 2 (survivors entitled to compensation for loss of services, protection, care, assistance, society, companionship, comfort, guidance).

(*Footnote continued*)

of financial dependency. Annot., *Recovery of Damages for Loss of Consortium Resulting from Death of Child-Modern*

Michigan, Mich. Comp. Laws Ann. § 600.2922(6) (loss of society and companionship available in all cases).

Minnesota, *Steinbrecher v. McLeod Coop. Power Ass'n.*, 392 N.W.2d 709 (Minn. App. 1976) (all beneficiaries are entitled to recover for loss of society, comfort, and consortium).

Mississippi, Miss. Code Ann. § 11-7-13 (parties shall recover "all damages of every kind"); *Motorola Communications and Electronics, Inc. v. Wilkerson*, 555 So.2d 713 (Miss. 1989) (adult daughter awarded compensation for loss of society of elderly father).

Missouri, Mo. Ann. Stat. § 537.090 (damages include value of lost consortium and companionship).

Montana, *Matter of Farnum*, 730 P.2d 391 (Mont. 1986); *Swanson v. Champion Intn'l Corp.*, 646 P.2d 1166 (Mont. 1982) (loss of spousal consortium); *Johnson v. Supersave Markets, Inc.*, 686 P.2d 209 (Mont. 1984) (grief or mental distress).

Nebraska, *Williams v. Monarch Transportation, Inc.*, 470 N.W.2d 751 (Neb. 1991) (parents have claim for pecuniary value of lost society, comfort and companionship of adult daughter).

Nevada, Nev. Rev. Stat. § 41.085 (damages include those for survivor's grief or sorrow and loss of companionship, society and consortium).

New Jersey, *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993) (parent entitled to pecuniary value of child's companionship).

New Mexico, *Romero v. Byers*, 872 P.2d 840 (N.M. 1994) (recognizing spousal common law claim for loss of consortium in case of death).

North Carolina, *Carver v. Carver*, 314 S.E.2d 739, 747 (N.C. 1984) (parent may recover for loss of child's society, companionship, comfort, etc. under N.C.Gen. Stat. § 28A-18-2(b)(4)b.)

North Dakota, *Hopkins v. McBane*, 427 N.W.2d 85, 90 (N.D. 1988) (parent may recover for loss of child's society, comfort and companionship).

Ohio, O.R.C. 2125.02(B) (surviving spouse, minor children, parents or next of kin may recover loss of society, including companionship, consortium, and care).

Oklahoma, Okla. Stat. Ann title 12, § 1053(B) (damages recoverable include spouse's loss of consortium and children's and parents' grief and loss of companionship).

Oregon, Or. Rev. Stat. § 30.020 (spouse, children and parents of decedent may recover for loss of society and companionship).

(*Footnote continued*)

Status, 77 A.L.R.4th 411 (1990). *But see Masunaga v. Gapasin*, 790 P.2d 171 (Wash. App.) (loss of love and companionship of children is permitted, but only where monetary dependency is shown), *review denied*, 798 P.2d 780 (Wash. 1990).

The trend toward recognition of loss of society damages has been fueled by judicial distaste for the undesirable consequences that result from a strict pecuniary loss rule, where the younger the victim, the cheaper it will be to kill than to injure.[11] Numerous state courts have overruled precedent bar-

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Pennsylvania, *Walton v. Avco Corp.*, 21 Av. Cas. (CCH) 18,340 (Pa. Super. 1989); *Mikula v. Harrisburg Polyclinic Hosp.*, 58 Pa. D. & C.2d 125 (1972) (loss of parental or spousal society and comfort).

South Carolina, *Self v. Goodrich*, 387 S.E.2d 713 (S.C. App. 1989) (parent has claim for loss of society and companionship for death of infant).

South Dakota, *Flagtwet v. Smith*, 367 N.W.2d 188 (S.D. 1985) (all survivors including parents have claim for loss of companionship and society of child).

Texas, *Moore v. Lillebo*, 722 S.W.2d 683 (Texas 1986) (loss of society and companionship).

Utah, *Allen v. United States*, 588 F. Supp 247, 444 (C.D. Utah 1984) (loss of society and companionship).

Vermont, Vt. Stat. Ann. title 14, § 1492 (loss of love and companionship of a minor child is recoverable as a pecuniary loss).

Virginia, *Breeding v. Johnson*, 159 S.E.2d 836 (Va. 1968) (father may recover for loss of child's care, attention and society).

Washington, *Masunaga v. Gapasin*, 790 P.2d 171 (Wash. App.) (loss of love and companionship of children is permitted, but only where monetary dependency is shown), *review denied*, 798 P.2d 780 (Wash. 1990).

West Virginia, W. Va. Code § 55-7-6 (damages for sorrow, mental anguish and solace including society, companionship, and comfort).

Wisconsin, *Chang v. State Farm Mut. Auto Ins. Co.*, 514 N.W.2d 399 (Wis. 1994) (parent has claim for loss of society and companionship of child); Wis. Stat. Ann. § 895.04 (damages for loss of society and companionship of decedent's spouse, children or parents may be awarded up to $150,000).

Wyoming, Wyo. Stat. § 1-38-102 (damages for loss of society and comfort).

[11] This is so because the younger the victim, the less likely it is that he or she has dependents, and the more difficult it is to prove his or

ring a recovery for loss of society in actions for the death of a minor, to address this disturbing situation. *E.g. Hopkins v. McBane*, 427 N.W.2d 85, 90 (N.D. 1988) (stating, "That this barbarous concept of the pecuniary loss to a parent from the death of his child should control our decisions today is a reproach to justice," *quoting Wycko v. Gnodtke*, 105 N.W.2d 118, 121 (Mich. 1960)).

That forty four states allow loss of society recoveries actually understates the virtual unanimity on the issue, because in several states a wrongful death recovery is not meant to compensate survivors for their losses, but rather, provides recovery to the decedent's estate for the decedent's lost opportunity to accumulate wealth and enjoy life.[12] Under this method, the loss of society question simply does not present itself, and the death of a child will not dictate a disturbingly minimal award of damages to the parents.

Because recovery of loss of society is the overwhelming majority rule under state laws, and because the Convention's liability limitation purpose is inoperative in wilful misconduct cases such as this, it would be improper to utilize the Convention as a basis for denying any plaintiff a loss of society recovery under the rubric of federal common law. Especially since the reference used below (General Maritime Law under *Moragne*) did not even exist when Congress ratified the Convention, there can be no argument that the Convention's drafters or Congress intended the Convention to be used to constrain the recoveries of plaintiffs.

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her prospects for prospering and supporting others. By contrast, the greater the youth of the victim, the greater his or her life expectancy and the greater the cost of treating and caring for him or her and compensating for impairments over that period of time.

[12] Eleven states—Alaska, Connecticut, Florida, Georgia, Hawaii, Kentucky, Massachusetts, Oregon, Pennsylvania, Rhode Island, and Tennessee—award death damages based on the loss to the estate of the decedent, or have "hybrid" statutes with this component. 2 Kreindler, Aviation Accident Law § 13.02[2] at 13-11 (Bender 1994).

3. A Proper Weighing of Federal Statutes Also Dictates the Conclusion that Loss of Society Damages Are Recoverable Under the Warsaw Convention.

The overwhelming consensus in favor of allowing loss of society damages under state laws should complete inquiry into the loss of society question, there being no controlling or compelling dictate from Congress to reject state law. However, to the extent this Court consults federal statutory analogues, none of them compel a different result.

In *In re Inflight Explosion on Trans World Airlines, Inc. Aircraft*, one of the first cases to apply the new federal common law rule in *Lockerbie I*, the court consulted caselaw under various federal statutes. 778 F. Supp. at 632-35.[13] Each of these statutes is evaluated here for its worth as a guidepost in applying the Warsaw Convention cause of action.

(a) Civil Rights Actions for Wrongful Death Provide a Superior Reference for Federal Common Law Under the Warsaw Convention and Regularly Permit Recovery of Loss of Society Damages by All Who Suffer Them.

42 U.S.C. § 1983 (the Ku Klux Klan Act of 1871), states that any person who under color of state law deprives another citizen of any right, privilege or immunity secured by the Constitution "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." In *Carey v. Piphus*, 435 U.S. 247 (1978), this Court held that

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[13] The statutes were: the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq.* (F.E.L.A.), the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, the Jones Act, 46 U.S.C.App. § 688 *et seq.*, the Civil Rights Act, 42 U.S.C. § 1983, the Death on the High Seas Act, 46 U.S.C.App. § 761 *et seq.*, ("DOHSA"), and General Maritime Law.

Section 1983 provides for an award of damages that will compensate for actual harm suffered. This Court commanded federal courts to fashion remedies by first referring to the general common law of torts and adapting that law, when necessary, "to provide fair compensation for injuries caused by the deprivation of a constitutional right." 435 U.S. at 258.

The mandate of this Court in *Piphus* is much like the one before this Court today (especially since the defendant has been found guilty of wilful misconduct)—to develop a federal common law that provides victims of international aviation accidents with fair and complete compensation for their injuries. In fulfilling that mandate under Section 1983, courts of appeals have faced the question of whether survivors of the deceased recover for their loss of society, and their answer has been positive. *Berry v. City of Muskogee*, 900 F.2d 1489, 1506-07 (10th Cir. 1990); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1251-53 (7th Cir. 1984) (loss of society damages awarded to parent of decedent); *Kelson v. City of Springfield*, 767 F.2d 651, 653-55 (9th Cir. 1985).[14]

Because federal common law in civil rights actions provides for damages to all survivors for loss of society, similar awards should be permitted under the Convention.

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[14] Other courts of appeals have authorized loss of society recoveries by survivors, under the law of the state where the wrongful death occurred. *E.g Rhyne v. Henderson County*, 973 F.2d 386, 390-91 (5th Cir. 1992).

Courts in the following cases have also awarded loss of society damages to the parents of persons who were unconstitutionally deprived of their lives. *Sharpe v. City of Lewisberg*, 677 F. Supp. 1362, 1368-69 (M.D. Tenn. 1988); *Doty v. Carey*, 626 F. Supp. 359, 363-64 (N.D. Ill. 1986).

(b) The Jones Act, Federal Employer's Liability Act and Longshoreman's Act are Inappropriate References for Warsaw Convention Cases, while Congress' Command in the Federal Tort Claims Act to Refer to State Laws is Instructive

The Federal Employers Liability Act, the Jones Act and the Longshoreman's Act do not provide appropriate references in fashioning a common law rule regarding loss of society damages for airline passengers in Warsaw Convention cases. These statutes protect a narrow class of persons—namely, employees. Congress could not have contemplated that the measure of damages for those decedents would govern actions for the deaths of airline passengers—a diverse group that typically includes children. The prototypical FELA/Jones/Longshoreman's Act decedent was and is a married male with dependents.

The records of this Amicus reveal that Pan Am Flight 103 carried over 100 young adults, many of them college students, who left parents surviving them. In formulating a rule that will apply to their cases, it is more appropriate to refer to general sources of wrongful death law. State law provides that source.

Indeed, in *In re Inflight Explosion of Trans World Airlines*, Judge Weinstein noted that the FTCA, which adopts state law as a measure of damages, is a better reference for the Warsaw Convention than the FELA, because it "has a broader sweep than the FELA, since it covers all possible plaintiffs rather than employees alone." 778 F. Supp. at 633.

(c) The Death on the High Seas Act Was Hastily Enacted to Fill a Gap in Federal Law and Is Not a Well-Considered Reference for Warsaw Convention Cases

Leaving aside whether DOHSA applies to this occurrence because flight 007 crashed into the high seas,[15] DOHSA can

[15] See Point III of this Brief.

and should not dictate any result under federal common law in a Warsaw Convention case. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 280-84 (1980) (outside their ambit, DOHSA and the Jones Act do not preclude a finding that the federal common law provides a remedy for loss of society).

This Court noted in *Alvez* that DOHSA and the Jones Act "should not be accorded overwhelming analogical weight in formulating remedies under general maritime law" because they were hastily enacted within days of each other yet are "hopelessly inconsistent" and not the product of "attentive legislative review." 446 U.S. at 282-83. The Warsaw Convention, by contrast, was the product of years of debate among the drafters of the Convention and several more years of debate before its ratification in 1934 by the United States Senate.

Moreover, although DOHSA is not limited to seamen, its limited geographic scope makes it a poor reference for Warsaw Convention cases for the same reason that the Jones Act and FELA are not instructive. Unlike passenger airliners, the class of people on the high seas is generally limited to adults—seamen and cruise ship passengers. DOHSA cannot be instructive on the loss of society issue when the death of children is a major consideration.

III

THE DEATH ON THE HIGH SEAS ACT DOES NOT SUPPLY THE GOVERNING LAW AS TO DAMAGES IN ANY WARSAW CONVENTION CASE.

The Warsaw Convention is a treaty, and therefore the supreme law of the land, U.S. Constitution, Article IV, Clause 2, equal in stature and force to the domestic laws of the United States. *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 533 (1987);

Sulewski v. Federal Express Corp., 933 F.2d 180, 182 (2d Cir. 1991).

General rules of statutory construction apply to treaties. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991). When a treaty conflicts with the terms of a previously enacted statute, the treaty prevails. *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1309 (9th Cir. 1982); *In re Erato*, 2 F.3d 11, 15 (2d Cir. 1993). Even when a Congressional enactment follows ratification of a treaty, if the two come in conflict the treaty must prevail unless Congress has made clear its intent to abrogate. *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1146 (3d Cir.) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-23 (1963)), *cert. denied*, 493 U.S. 944 (1989); *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 936-37 (D.C.Cir. 1988) (citing *Cook v. United States*, 288 U.S. 102 (1933)). This flows from the fact that a treaty is a matter of international law and governs our relationships with other countries.

Finally, if a treaty addresses a legal question more specifically than an inconsistent general statute, the treaty governs. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

These principles dictate the conclusion that notwithstanding anything in DOHSA, plaintiffs are entitled to state a claim under the Warsaw Convention and receive compensation in accordance with federal common law that is consistent with the Convention's purposes. *In re Korean Air Lines Disaster*, 814 F.Supp. 592, 597 (E.D. Mich. 1993). Warsaw is both a more recent enactment than DOHSA and a more specific act by Congress governing death actions from aviation accidents. The argument that DOHSA applies here can only be made because its terms are so general.

The Warsaw Convention must govern here because there is a fundamental inconsistency between both the liability and damages standards of the two acts. On damages, DOHSA pro-

vides only for "pecuniary loss," 46 App. U.S.C. § 762, whereas Warsaw allows all "damage sustained." Article 17. "Damage sustained" and "pecuniary loss" are two different things. With respect to liability, DOHSA was hastily enacted to fill a gap in the law and provide a minimal, negligence-based recovery for those who otherwise would have received nothing, while the Convention established a two-tiered damages structure under Article 22, which capped damages unless wilful misconduct is found under Article 25. Therefore, Warsaw requires that carriers pay all damage sustained in case of wilful misconduct. To insert the DOHSA damages standard into the Warsaw Convention when wilful misconduct is proven would be improper.

In addition, the court below correctly noted that application of DOHSA to accidents on the high seas would make uniformity in aviation accident cases impossible. 43 F.3d at 21. For that additional reason, DOHSA standards should not govern here.

Conclusion

Amicus Curiae respectfully submits that the court of appeals below was correct in finding that loss of society damages are recoverable under the Warsaw Convention, but erred in imposing a financial dependency requirement on that recovery. In developing the federal common law, state laws are the primary reference. The dependency rule followed by a few lower federal courts, but by no means all of them, in General Maritime Law cases, is neither controlling nor sensible, even in the context in which it was developed. The dependency requirement is especially inconsistent with the intent of the drafters of the Warsaw Convention to permit a recovery for all damage sustained in cases where wilful misconduct has been proven.

The Death on the High Seas Act cannot provide the measure of damages in Warsaw Convention cases. DOHSA was a stopgap measure. It has limited geographic scope and would

defeat the Convention's goal of uniformity if imposed in aviation accident cases that happen to occur over the high seas.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARJORIE ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF MURIEL A.M.S. KOLE, AND MURIEL MAHALEK,
Petitioners/Cross-Respondents,

v.

KOREAN AIR LINES CO., LTD.,
Respondent/Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF PAN AMERICAN WORLD AIRWAYS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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BEST AVAILABLE COPY

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---

MOTION OF PAN AMERICAN WORLD AIRWAYS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pan American World Airways, Inc. ("Pan Am") moves for leave to file the attached brief as *amicus curiae* in support of respondent/cross-petitioner Korean Air Lines. While Korean Air Lines has consented to the filing of this brief, Marjorie Zicherman and Muriel Mahalek have not.

This case presents the issues of who are the appropriate claimants and what are the available elements of compensatory damages in wrongful death actions governed

by the Warsaw Convention.[1] For six decades, Pan Am was America's leading overseas carrier and was thus the U.S. airline most affected by the Convention. Pan Am's particular interest in this case stems from the fact that it is a defendant in cases arising out of the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. A jury has found that Pan Am engaged in "wilful misconduct" that allowed the bomb to be placed aboard the aircraft.[2] As a result, Pan Am is liable under the Convention to pay full compensatory damages for the deaths of passengers aboard Flight 103.

In the past six months, Pan Am has settled claims for the deaths of approximately 76 passengers aboard Flight 103, but claims for the deaths of approximately 135 passengers are still pending. Virtually all of the pending cases present the issue of whether damages for the loss of the decedent's society are available in a Warsaw Convention case, and the Plaintiffs' Committee in *Lockerbie* has filed an *amicus* brief arguing that loss-of-society damages should be available.

Pan Am agrees with Korean Air Lines that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. §§ 761-68, should provide the measure of damages in this case, but Pan Am has an interest that is different from that of Korean Air Lines. Under one analysis available to Korean Air Lines, DOHSA, by its own force, could apply directly to all air

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note.

[2] The judgment on the liability verdict was affirmed by a divided Court of Appeals, *In re Air Disaster at Lockerbie*, 37 F.3d 804 (2d Cir. 1994)("*Lockerbie II*"), and this Court denied Pan Am's petition for certiorari on January 23, 1995, 115 S.Ct. 934.

disasters that occur in or over the high seas. In the attached brief, Pan Am argues that the federal common law should supply the measure of damages for all wrongful deaths under the Warsaw Convention and that DOHSA should be borrowed as the source of that federal common law. In that event, DOHSA would provide a uniform law of damages whether an accident covered by the Convention occurs on or over dry land (such as at Lockerbie) or on or over the high seas.

Wherefore, Pan Am respectfully requests leave to file the attached brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-1361, 94-1477

MARJORIE ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF MURIEL A.M.S. KOLE, AND MURIEL MAHALEK,

Petitioners/Cross-Respondents,

v.

KOREAN AIR LINES CO., LTD.,

Respondent/Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PAN AMERICAN WORLD AIRWAYS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

INTEREST OF *AMICUS CURIAE*

Pan American World Airways, Inc. ("Pan Am") submits this brief as *amicus curiae* in support of respondent/cross-petitioner Korean Air Lines. For six decades, Pan Am was America's principal overseas carrier and was thus the U.S. airline most affected by the Warsaw Convention.[1] Pan

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note.

Am's interest in the issues at bar derives from the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. A jury has found that Pan Am engaged in "wilful misconduct" that allowed the bomb to be placed on board the aircraft.[2] As a result, Pan Am is liable under the Convention to pay full compensatory damages for the deaths of the passengers aboard Flight 103.

In the past six months, Pan Am has settled claims for the deaths of approximately 76 passengers aboard Flight 103, but claims for the deaths of approximately 135 passengers are still pending. Virtually all of the pending cases present the issue of whether damages for the loss of the decedent's society are available in a Warsaw Convention case.

Pan Am agrees with Korean Air Lines that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. §§ 761-68, should provide the measure of damages in this case. Under one analysis available to Korean Air Lines, DOHSA, by its own force, could apply directly to all air disasters in or over the high seas. Pan Am's special and separate concern is that DOHSA be borrowed as the federal common law of damages so that there will be a uniform remedy for all cases arising under the Warsaw Convention, including those where the accident occurred on or over dry land, as at Lockerbie.

SUMMARY OF ARGUMENT

I. Plaintiffs have misinterpreted the scope and function of Articles 17 and 24 of the Warsaw Convention. Article 17 creates a cause of action for wrongful death and personal

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[2] The judgment on the liability verdict was affirmed by a divided Court of Appeals, *In re Air Disaster at Lockerbie*, 37 F.3d 804 (2d Cir. 1994) ("*Lockerbie II*"), and this Court denied Pan Am's petition for certiorari on January 23, 1995, 115 S.Ct. 934.

injury by making the international carrier "liable for damage sustained in the event of the death or wounding of a passenger." The phrase "damage sustained" does not specify the items of compensatory damages that may be recovered, as plaintiffs contend.

While the framers of the Convention initially considered providing an international choice-of-law rule for damages, they eventually abandoned that plan. Instead, the drafters provided that the measure of damages for the cause of action shall be chosen by the national law of the forum. Thus, Article 24 states that the terms of Article 17 and the conditions and limitations set out in other articles do not govern questions as to "the persons who have the right to bring suit and what are their respective rights." The Convention's Reporter, Henri De Vos, explained that questions as to who constitute the class of beneficiaries and "what are the damages subject to reparation" should be "regulated *independently* from the present convention."

II. Faced with the need to choose and apply a national or local measure of damages, the Second Circuit has held that the federal common law of damages applies. While this holding is not at issue here, it is important because many of the reasons that support the application of the federal common law also point to the Death on the High Seas Act as the proper source of that common law. In particular, the adoption of a federal common law of damages ensures that interests of uniformity will not be shattered by federal courts applying state laws having widely divergent rules governing who qualify as beneficiaries and what types of damages are recoverable.

Here, the cause of action arises from a treaty and thus is federal in character. When the treaty was ratified by the United States, the Congress did not adopt implementing

legislation that would fill the gaps that the Convention intentionally left for national law. Instead, Congress left the task of gap-filling to the courts. At that time, 1934, the federal courts applied the general common law under *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), and thus could be expected to develop a uniform body of law governing damages and other issues that the Convention left to national law. The Second Circuit's reliance on the federal common law of damages to fill the gap created by Article 24(2) plainly serves the interest of uniformity and fulfills the expectation of those who drafted and ratified the Convention.

III. In developing federal common law remedies, courts, if possible, are to draw upon federal statutes where Congress has already balanced the competing values and policies. But, in selecting the source of the federal common law of damages for wrongful death claims under the Convention, the Second Circuit disregarded three federal statutes that provide damages for wrongful death, and chose instead to look to the wrongful death actions under "general maritime law." In doing so, the court chose the most amorphous, most criticized, and least utilized source for the common law.

Wrongful death has always been a creature of statute, starting with Lord Campbell's Act. Wrongful death statutes are especially helpful in defining the class of persons who are the proper beneficiaries or claimants in a wrongful death case. The statutes also reflect a legislative balance between the breadth of the class of beneficiaries and the measure of damages that may be recovered.

Because the Court of Appeals laid aside DOHSA and two other federal statutes governing wrongful death claims, it found itself obliged to draw the lines limiting who may recover. This led the court to its "financial dependency"

requirement, a line somewhat different from the line that Congress drew in DOHSA and the other federal statutes. It also led the Court of Appeals to recognize loss of society as an element of damages even though all wrongful death statutes enacted by Congress exclude this element and limit a claimant's recovery to pecuniary losses.

Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978), requires that courts take DOHSA as their "primary guide" in refining a "nonstatutory death remedy" because reliance on the federal statute will serve the interest of uniformity and will give proper deference to considered judgments of Congress. When the Second Circuit relied instead on general maritime law, as set out in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), it unnecessarily intruded upon the policy determinations of Congress that are to be respected by the courts in developing federal common law. In addition, the Second Circuit's selection of *Gaudet* over the statutes is inconsistent with the efforts of this Court and others to bring as much uniformity as possible to the field of maritime law. *Gaudet* is now a sport, limited to the wrongful death of a single class of workers -- longshoremen -- if they are killed within territorial waters of the United States. In lieu of embracing this anomaly as the source of the federal common law of damages, the court below should have borrowed the schedule of beneficiaries and the measures of damages from DOHSA, a generally applicable law that applies to the deaths of both passengers and workers.

ARGUMENT

The Warsaw Convention creates a cause of action for wrongful death in international air carriage and prescribes many of the elements of that action; but, as we show in Part I, the Convention looks to the national law of each signatory to resolve the questions of (1) who are the

appropriate beneficiaries in a wrongful death action and (2) what is the measure of their compensatory damages. The state law is in disarray on these two questions, and the Court of Appeals, as we show in Part II, properly chose federal common law to resolve those two questions. Finally, as we show in Part III, the Death on the High Seas Act should be the source of this federal common law.

I. THE WARSAW CONVENTION CREATES A CAUSE OF ACTION FOR THE WRONGFUL DEATH OF PASSENGERS AND EXPLICITLY LEAVES TO NATIONAL LAW THE DECISIONS AS TO WHO ARE THE APPROPRIATE BENEFICIARIES AND WHAT ARE THE AVAILABLE ELEMENTS OF DAMAGES.

The Zicherman petitioners and their *amici*[3] contend that Article 17 of the Convention grants damages for loss of society because Article 17 makes carriers liable for all "damage sustained."[4] (Zich. Br. 7-9; Lock. Pl. Br. 9-10; Dooley Br. 7-11.) This argument fails to take account of Article 17's place in the Convention and, more importantly, the language and drafting history of Article 24.

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[3] Petitioners/cross-respondents will be referred to as "the Zicherman petitioners" and their brief as "Zich. Br." The *amicus* briefs for Philomena Dooley *et al.* and the Plaintiffs' Committee in *Lockerbie* will be referred to as "Dooley Br." and "Lock. Pl. Br.", respectively. Collectively, we refer to the other side as "plaintiffs."

[4] Article 17 states:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The Convention creates a federal cause of action for personal injury and wrongful death. *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 533 n.2 (1991).[5] Article 17 prescribes the basic prerequisites for carrier liability. There must be an "accident" (as defined in *Air France* v. *Saks*, 470 U.S. 392 (1985)) that causes "death, physical injury, or physical manifestation" (*Floyd*, 499 U.S. at 552) to a passenger who is on board the aircraft or embarking onto or disembarking from the aircraft (see, *e.g.*, *Buonocore* v. *Trans World Airlines, Inc.*, 900 F.2d 8 (2d Cir. 1990)).

Other provisions of the Convention set out additional elements and conditions of the Warsaw cause of action: the international nature of the flight (Art. 1), the limitations on the liability of the carrier (Art. 22),[6] the circumstances in which these limitations on liability may be lifted (Art. 25), the fora where suit may be brought (Art. 28(1)), and the time limitation for filing such an action (Art. 29).

While the Convention sets out many substantive requirements for wrongful death actions, it also explicitly looks to the forum (*i.e.*, national law) to choose and supply other necessary law. For example, the Convention expressly incorporates the law of the forum to determine the legal effect, if any, of the passenger's own negligence (Art. 21), to

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[5] Accord, *e.g.*, *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Abramson* v. *Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *In re Mexico City Aircrash*, 708 F.2d 400 (9th Cir. 1983); *St. Paul Ins. Co.* v. *Venezuelan International Airways, Inc.*, 807 F.2d 1543 (11th Cir. 1987).

[6] As supplemented by the "Montreal Agreement" (49 U.S.C. App. § 1502 note), the Convention generally limits damages to $75,000 per passenger.

resolve questions of procedure (Art. 28(2)), and to determine how compliance with the time limitation is to be calculated (Art. 29).

In the context of this case, the most important provision incorporating national law is Article 24(2), which provides:

> "In the cases covered by article 17 the provisions of the preceding paragraph [that any action for damages can only be brought subject to the Convention's conditions and limitations] shall also apply, without prejudice to the questions as to *who are the persons who have the right to bring suit and what are their respective rights*." (Emphasis added.)

The Zicherman petitioners assert that "this Article refers only to procedural questions, not substantive ones," *i.e.*, who may sue and how any recovery is to be divided among potential plaintiffs. (Zich. Br. 15-16.) That assertion is belied by the Convention's Reporter, Henri De Vos; he told the Warsaw Conference that the issues of who can sue and what compensatory damages are available would be "regulated independently" from the Convention according to "private international law" (*i.e.*, national choice-of-law rules):[7]

> "The question was asked of knowing if one could determine *who the persons upon whom the action devolves in the case of death are, and what are the damages subject to reparation*. It was not possible to

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[7] "'Conflict of laws' is the term primarily used in the United States, Canada and more recently in England, while the Continental countries, and some writers in England . . . refer to 'private International Law.'" E. Scoles & P. Hay, Conflict of Laws § 1, at 1 (2d ed. 1992).

> find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be *regulated independently from the present Convention*."[8]

The De Vos report is borne out by the early work of CITEJA (Comité International Technique d'Experts Juridiques Aériens), the committee of experts who prepared the initial draft of the treaty considered by the delegates to the Warsaw Conference. *Floyd*, 499 U.S. at 542-43. CITEJA considered a provision that would, in the case of the death of a passenger, have applied the national law of the decedent's domicile as the measure of damages.[9] After debate, CITEJA determined to leave this matter to the forum court's own choice-of-law rules.[10]

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[8] Second International Conference on Private Aeronautical Law, Warsaw, 1929, Minutes, at 255 (R. Horner & D. Legrez trans. 1975) (emphasis added).

[9] A proposed Art. 27 would have provided:

> "In case of death of the rightful claimant, any action in responsibility, whatever it might be, can be exerted, in the conditions and limitations provided for by the present Convention, by the persons to whom this action belongs according to the deceased's national law, or, if unapplicable, according to that of the last place of residency." International Technical Committee of Legal Experts on Air Questions, Report of Third Session, May 1928, at 114 (F. Sautman trans. 1976)("CITEJA Minutes").

This history is also recounted in D. Goedhuis, National Airlegislations and the Warsaw Convention 270 (1937)("D. Goedhuis"); Haanappel, *The Right to Sue in Death Cases Under the Warsaw Convention*, 6 Air L. 66, 67 (1981)("Haanappel").

[10] CITEJA Minutes at 56. One commentator has explained this action as follows:

(continued...)

In short, petitioners' assertion that Article 17 itself gives them a right to recover damages for loss of society is refuted by Article 24(2) and its drafting history. That history shows that the Convention's drafters intended that Article 24 would leave the issue of what compensatory damages would be available to the "private international law" of the forum. This construction of Article 24 has been embraced almost uniformly by the courts[11] and the commentators.[12]

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[10] (...continued)

"In 1929 many countries, particularly amongst common law countries, had no rules on the survival of contractual rights, and wrongful death statutes, where they existed, varied greatly in scope and substance, *i.e.* with respect to the 'persons who have the right to bring suit' and to 'their respective rights'. In a matter so intimately intertwined with the national particularities of tort and family law, any attempt at unification of these rules was bound to lead nowhere." R. Mankiewicz, The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System ¶ 187, at 161 (1981)("R. Mankiewicz").

[11] *E.g.*, *In re Air Disaster at Lockerbie*, 928 F.2d 1267, 1283 (2d Cir.) ("*Lockerbie I*") ("Commentators and case law are in accord that the Convention leaves the measure of damages to the internal law of parties to the Convention."), *cert. denied*, 502 U.S. 920 (1991); *In re Korean Air Lines Disaster*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991); *Harris* v. *Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987). There is, however, an English trial court decision that relied upon Article 17 in awarding an element of non-economic damages not then available under English law. *Preston* v. *Hunting Air Transport Ltd.*, [1956] 1 Q.B. 454. This decision should not be followed because the court failed to consider Article 24.

[12] See H. Drion, Limitation of Liabilities in International Air Law ¶ 111, at 125-26 (1954)("[I]t is certain that the matter of measure of damages for death or injuries was intended [by the Warsaw Convention, *inter alia*] to be left to the applicable law."); D. Goedhuis at 269 ("The Warsaw Convention did not wish to determine the persons who have the right to bring an action in the event of the death . . . [of a] passenger, or to what degree the carrier

(continued...)

Consequently, the issue of whether petitioners may recover loss of society damages is to be determined by the law chosen by American choice-of-law principles.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT FEDERAL COMMON LAW SHOULD BE APPLIED IN WRONGFUL DEATH ACTIONS UNDER THE WARSAW CONVENTION.

Because Article 24(2) directs the forum court to apply its national law to select the measure of damages, the federal courts have been required either to develop a federal choice-of-law rule that picks and chooses among the various state laws relating to damages or to adopt federal common law as the measure for damages for wrongful death in all cases arising under the Warsaw Convention. In *Lockerbie I*, the Second Circuit determined that claims for damages under the Warsaw Convention should be governed by federal common law. 928 F.2d at 1278-80. No plaintiff challenges this ruling by contending that state law should govern. The issue, as framed by the parties, is whether the Second Circuit should have borrowed the schedule of beneficiaries and the elements of damages from the Death on the High Seas Act

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[12] (...continued)
should indemnify."); R. Mankiewicz ¶ 187, at 161 ("... Article 24(2) leaves a gap with respect to the persons entitled to compensation and to the amount and kind of compensation when the passenger has died in or as a result of an accident."); N. Matte, Treatise on Air-Aeronautical Law ¶ 163, at 403 (1981)("It would have been better if the Convention had specified what kind of damage was envisioned: direct, indirect or simply moral."); G. Miller, Liability in International Air Transport: The Warsaw System in Municipal Courts 125 (1977); Haanappel at 67-69. The article cited by the Lockerbie plaintiffs (at 12) is not to the contrary. It acknowledges that "the Warsaw Convention does not concern itself with ... categories of damages ...." Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 Air L. Rev. 25, 56 (1936).

as the federal common law of damages under the Convention or whether it should have borrowed general maritime law, as enunciated in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974).

If the Second Circuit had used a choice-of-law rule, rather than the federal common law of damages, it would have been required to apply DOHSA in this case. Section 7 of DOHSA, 46 U.S.C. App. § 767, preempts any state laws that might otherwise apply to wrongful deaths on the high seas. *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 231-32 (1986). While such a choice-of-law analysis would provide a uniform and readily identifiable law for aviation accidents at sea, such as the Korean Air Lines disaster, it would introduce factual controversies and a plethora of competing laws from many jurisdictions in disasters on or above land or territorial waters.

One "stated purpose" of the Warsaw Convention was "achieving uniformity of rules governing claims arising from international air transportation."[13] *Floyd*, 499 U.S. at 552. Only application of federal common law of damages would further that purpose, inasmuch as use of state law on damages would lead to disparate and diverse results based sometimes on differences in state law and sometimes on whether the airplane made it to land or territorial waters before the deaths occurred. For example, if state law rather than federal common law of damages were employed, a court might apply the law of damages of each passenger's

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[13] The preamble to the Convention explicitly "recognize[s]the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of . . . the liability of the carrier . . . ."

domicile.[14] In that event, deaths of passengers in the same aircraft would produce different recoveries depending upon whether the passenger was domiciled, for example, in Massachusetts (which allows non-pecuniary damages) or in New York (which does not allow non-pecuniary damages).[15] Moreover, in cases like that at bar, one would have disputes as to which of those two state laws should be applied when the decedent had residences in both states (J.A. 61-75). Finally, courts would have to struggle with what they have variously characterized as the "Syrtis bog" or "judicial nightmare" created by modern choice-of-law rules.[16] Federal common law pretermits the disputes, avoids the quagmire, and ensures that, in cases governed by the Warsaw Convention, the claims of U.S. citizens will receive uniform and equal treatment in U.S. courts.[17]

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[14] See, *e.g.*, *Johnson* v. *Continental Airlines Corp.*, 964 F.2d 1059, 1061 (10th Cir. 1992)(parties' stipulation in non-Warsaw case).

[15] Compare Mass. Ann. Laws ch. 229, § 2 (Law. Co-op. 1995) (allowing damages for loss of society and companionship) with N.Y. Estates, Powers and Trusts Law § 5-4.4 (Consol. 1994) (recovery limited to pecuniary injury). See also notes 23, 29-33 *infra* (describing differences among state laws).

[16] *Lockerbie I*, 928 F.2d at 1276; *Forsyth* v. *Cessna Aircraft Co.*, 520 F.2d 608, 609 (9th Cir. 1975). See also, *e.g.*, *In re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981); *In re Air Crash Disaster at Washington, D.C.*, 559 F. Supp. 333 (D.D.C. 1983). Professor Lowenfeld has written that "the airplane cases . . . seem to have made a parody not only of the conflict of laws but of the law of torts in general." Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. Ill. L. Rev. 157, 158.

[17] Even in cases outside the Convention, lower courts and commentators have long urged that substantive federal law be applied to airline disaster cases. See, *e.g.*, *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400, 403 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975)(cited approvingly in *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 90 (1981)); *In re Air Crash*

(continued...)

The Convention was adopted at a time and under circumstances that make it especially appropriate for the federal courts to fill in the gaps of the Convention by applying federal common law. The Convention on its face invited signatory nations to supply their own law in wrongful death actions to resolve at least five issues left open by the framers of the Convention (see pp. 7-8, *supra*); but the Congress chose not to enact implementing legislation that would fill those gaps. Instead, the Convention was ratified without debate in 1934,[18] thus leaving the implementation of this treaty entirely to the courts. At that time, the power and readiness of the federal courts to fill the gaps deliberately left in the Convention was undoubted. The general common law adopted under *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), was in full play. Given that this general common law applied to accident claims against the most important carriers of that day, railroads, Congress could reasonably expect that this law would apply to accident

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[17] (...continued)
Disaster Near Chicago, 644 F.2d at 632-33; *In re Disaster at Detroit Metropolitan Airport*, 750 F. Supp. 793, 814 (E.D. Mich. 1989); Friendly, *In Praise of Erie -- And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 417-18 (1964); Lowenfeld, *supra* note 16, at 170-72; Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role For Federal Common Law?*, 54 Fordham L. Rev. 167 (1985).

[18] 78 Cong. Rec. 11577-82. The only contemporaneous explanation is a memorandum by Secretary of State Hull that President Roosevelt submitted to the Senate. It does not discuss the choice-of-law issue. Sen. Comm. on Foreign Relations, Sen. Exec. Doc. G, 73d Cong., 2d Sess. (1934).

claims against air carriers. See *Baltimore & O. R. Co.* v. *Baugh*, 149 U.S. 368 (1893).[19]

While *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), extirpated the federal *general* common law, it also cleared the way for the federal courts to develop a federal (not general) common law that would flesh out the meaning and application of those legal prescriptions that are federal in nature.[20] Thus, the federal courts have the power "to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress."[21] See also *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 95 (1981)(common-law development of "[b]roadly worded constitutional and

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[19] Moreover, applying federal common law would enable courts to apply U.S. law to accidents in foreign countries. See, *e.g.*, *Lauritzen* v. *Larsen*, 345 U.S. 571, 583 (1953). When the Convention was ratified by the U.S. in 1934, the established choice-of-law rule was *lex loci delicti*. Under that rule, state law could *not* govern the damages of a U.S. claimant where the accident occurred abroad. See, *e.g.*, *Slater* v. *Mexican National R. Co.*, 194 U.S. 120 (1904). Indeed, outside the Convention, foreign law is still applied to certain wrongful death claims of U.S. citizens in foreign air crashes. See *Tramontana* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965)(choosing Brazilian law that limits damages for wrongful death to $170), *cert. denied*, 383 U.S. 943 (1966); *Barkanic* v. *General Admin. of Civil Aviation*, 923 F.2d 957 (2d Cir. 1991)(choosing Chinese law that limits damages for wrongful death to $20,000).

[20] See Friendly, *supra* note 17.

[21] Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 800 (1957). See, *e.g.*, *Musick, Peeler & Garrett* v. *Employers Insurance of Wausau*, 113 S.Ct. 2085, 2089 (1993); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957). See generally Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881 (1986).

statutory provisions"). In recent times, moreover, this Court has recognized that "any common law rule necessary to effectuate a private cause of action under [a federal] statute is necessarily federal in character." *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 97 (1991).

The private cause of action created by the Warsaw Convention is plainly "federal in character" (*id.*); and the "federal interest requires a uniform rule." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 508 (1988). Given the Convention's explicit purpose of establishing uniformity of law for international aviation disasters, there would be a "'significant conflict between [this] federal policy or interest and the use of state law.'" *O'Melveny & Myers* v. *FDIC*, 114 S.Ct. 2048, 2055 (1994)(citation omitted). Thus, the cause of action created by the treaty should be implemented through the federal common law as the Second Circuit held in *Lockerbie I*.

III. THE DEATH ON THE HIGH SEAS ACT SHOULD BE THE SOURCE OF THE COMMON LAW APPLIED IN WRONGFUL DEATH ACTIONS UNDER THE WARSAW CONVENTION.

There are three federal statutes that provide a cause of action for wrongful death -- for seamen, the Jones Act (46 U.S.C. App. § 688); for railroad workers, the Federal Employers' Liability Act ("FELA" (45 U.S.C. §§ 51-60)); and for all persons killed upon the high seas, the Death on the High Seas Act. These statutes were adopted before the Warsaw Convention; they are similar in their definition of beneficiaries and virtually identical in the measures of damages that they adopt. Each act was intended to provide uniform rights and remedies for the deaths of persons who,

by the circumstance of their jobs or personal predilections, are engaged in travel.

In supplying the federal common law of damages under Article 24(2) of the Convention, the Second Circuit rejected DOHSA and the other federal statutes as the proper source of the federal common law and instead adopted the general maritime law as set out in *Gaudet*. Pet. App. A5-A6; *Lockerbie II*, 37 F.3d at 828-30. The lower court's choice of the governing law is contrary to the selection principles developed by this Court; it leads to unnecessary line-drawing by judges in areas where Congress has already drawn the necessary lines; and it promotes fragmentation rather than uniformity of law and results.

A. DOHSA Should Provide the Schedule of Beneficiaries for Death Actions Under the Warsaw Convention.

The Court has long recognized: "If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law." *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 69 (1966). That principle should apply with even greater force where a federal court embarks upon line-drawing in an area that has been the creature of statute since Lord Campbell's Act, 9 & 10 Vict., ch. 93 (1846).

"The one aspect of a claim for wrongful death that has no precise counterpart in the established law governing nonfatal injuries is the determination of the beneficiaries who are entitled to recover." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 406 (1970). Some schedule of beneficiaries must be applied in wrongful death cases; otherwise, anyone who claims to have been injured by a passenger's

death, including business associates and friends, might be eligible to sue for damages.

When the Court first held in *Moragne* that there is a cause of action for wrongful death under the general maritime law, the United States urged that the Court borrow the schedule of beneficiaries from the Death on the High Seas Act. 398 U.S. at 407-08. While the Court acknowledged the strength of that argument, it determined that the "final resolution [of this issue] should await further sifting through the lower courts in future litigation." *Id.* at 408. After eight years of percolation, the Court, in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), definitively stated that in maritime cases "DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Id.* at 624.

For the same reasons, DOHSA should be the source of the beneficiary schedule used in Warsaw actions. Some schedule must be used, and DOHSA provides a uniform schedule that reflects "Congress' considered judgment." The only alternative, borrowing the beneficiary schedules from state statutes, would install discrepancy in the rightful place of uniformity in Warsaw Convention cases.[22] As noted in

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[22] In the analogous situation of developing a statute of limitations, the courts avoid judicial line drawing and borrow from the closest state or federal statute. While often a state statute is used, this Court has borrowed a statute of limitations from federal law when that is "more in harmony with the objectives of the immediate cause of action." *North Star Steel Co. v. Thomas*, 115 S.Ct. 1927, 1931 (1995)(citing *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 362 (1991); *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143, 153, 156 (1987)).

the margin, the state statutes set out detailed and divergent criteria as to when siblings may recover, if at all.[23]

Here the Court of Appeals rightly rejected any notion that it should borrow from the state wrongful death statutes. The court, however, erred in not borrowing from DOHSA, thus giving rise to the dependency issue that is presented in the Zicherman petition as one based on "general maritime law." As to Marjorie Zicherman, the dependency question is answered by DOHSA *if* its schedule of beneficiaries is applied in cases arising under the Warsaw Convention. DOHSA authorizes suit only by "the personal representative of the decedent . . . for the *exclusive benefit* of the decedent's *wife, husband, parent, child, or dependent relative* . . . ." 46 U.S.C. App. § 761 (emphasis added). If DOHSA were

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[23] Some statutes preclude recovery by siblings altogether. See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 12-612(A), 12-613 (1994) (in the absence of surviving spouse, children, or parents, recovery is on behalf of decedent's estate); Iowa Code § 633.336 (1995) (beneficiaries limited to surviving spouse and children); N.D. Cent. Code § 32-21-03 (1993) (action may be maintained by surviving spouse, children, or parents); 42 Pa. Cons. Stat. § 8301(B) (1994) (beneficiaries limited to surviving parents, children, or spouse of deceased); Tex. Civ. Prac. & Rem. Code Ann. § 71.004(a) (West 1995) (same). Other state statutes allow siblings to recover only if they were dependent upon the decedent. See, *e.g.*, Alaska Stat. § 09.55.580(a) (1994) (siblings must be "dependent"); Haw. Rev. Stat. § 663-3 (1994) (siblings must be "wholly or partly dependant"); Idaho Code § 5-311(2)(b) (1994) (same); Wash. Rev. Code Ann. § 4.20.020 (Michie 1994) (siblings must be "dependent" and "within the United States"). Others allow recovery by siblings only if they are decedent's closest surviving relatives. See, *e.g.*, La. Civ. Code Ann. art. 2315.2 (West 1995) (siblings may recover only in absence of surviving spouse, children, or parents); Mass. Ann. Laws ch. 229, § 1 (Law Co-op. 1995) (siblings may recover in absence of surviving spouse, children, or parents); Me. Rev. Stat. Ann. tit. 18-A, § 2-804(B) (West 1994) (siblings as decedent's "heirs" in absence of surviving spouse or minor children); Miss. Code Ann. § 11-7-13 (1993) (siblings may recover only in absence of surviving spouse or children); N.M. Stat. Ann. § 41-2-3 (Michie 1994) (siblings may recover only in absence of surviving parent, spouse, children, or grandchildren).

adopted, Ms. Zicherman, as decedent's sister, would not be entitled to any damages unless she was dependent upon decedent.[24] Muriel Mahalek, as decedent's mother, would not have to prove dependency under DOHSA, but, as shown in the next section, her recovery would be limited to pecuniary losses.

Because the court below did not borrow from the federal statutes governing wrongful death claims, it created the need to draw lines that are not synchronized with any established body of statutory law. The court below, we submit, should have borrowed DOHSA's schedule of beneficiaries, and that schedule requires siblings, such as Ms. Zicherman, to prove dependency.

B. DOHSA Should Provide the Measure of Damages in Death Actions Under the Warsaw Convention.

Just as DOHSA should be the source of the schedule of beneficiaries in death actions under the Warsaw Convention, it should be the source of the damages law for death actions arising under the Warsaw Convention. The statutory

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[24] Consistent with DOHSA, neither the Jones Act nor the FELA would produce a different result for Ms. Zicherman. Those other two statutes also require a sibling to show dependency. The Jones Act, 46 U.S.C. App. § 688, incorporates by reference the beneficiary provisions of FELA; and the FELA provides that, in the case of the death of a railway employee, the railroad is liable to the employee's personal representative "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, *if none, then of the next of kin dependent upon such employee*"). 45 U.S.C. § 51 (emphasis added). In the same vein, the Longshore and Harbor Workers' Compensation Act allows siblings to recover workers' compensation only if certain conditions are met, including that the siblings were "dependent upon the deceased at the time of the injury . . . ." 33 U.S.C. § 909(d).

schedule of beneficiaries and the statutory measure of damages in DOHSA reflect a balancing of synchronized interests. The court below, however, declined to borrow DOHSA's measure of damages. Relying on *Gaudet*, the Second Circuit held that dependents may recover damages for loss of society. In so doing, the court erred. The federal common law to be applied under the Warsaw Convention should be derived from congressional enactments rather than from a decision that has been so discredited by subsequent decisions that it has been limited to its facts.

1. The Court Should Defer to Congress' Determination That Damages for Wrongful Death Are Limited to the Claimant's "Pecuniary Loss."

DOHSA, as well as the Jones Act and the FELA, presented the court below with federal wrongful death statutes, all of which limited the claimants' recoveries to pecuniary losses and thus denied any recoveries for non-economic damages such as loss of society.[25] These statutes plainly constitute the "prime repository of federal policy and a starting point for federal common law" respecting the measure of damages for wrongful death. *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. at 69. In *Higginbotham*, moreover, the Court stated that "DOHSA should be the courts' primary guide as they refine the nonstatutory death

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[25] DOHSA declares that the plaintiff's recovery "shall be a fair and just compensation for the *pecuniary loss* sustained by the persons for whose benefit the suit is brought . . . ." 46 U.S.C. App. § 762 (emphasis added). *Higginbotham*, 436 U.S. 618, held that loss-of-society damages may not be recovered under this "pecuniary loss" standard. It is equally clear that loss-of-society damages may not be recovered under the Jones Act (*Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990)) or the FELA (*Michigan Central R. Co.* v. *Vreeland*, 227 U.S. 59, 69-71 (1913)).

remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." 436 U.S. at 624. In other areas of law, as well, the Court has a long history of deferring to Congress' choice of remedies and declining to supplement or augment those remedies.[26]

Whether death actions should allow for recovery of damages for loss of society calls for a resolution of competing policy considerations on which the legislative judgment should be paramount. Those factors to be considered were described in *Higginbotham*:

> "Courts denying recovery cite two reasons: (1) that the loss is 'not capable of measurement by any material or pecuniary standard,' and (2) that an award for the loss 'would obviously include elements of passion, sympathy and similar matters of improper character.' . . . Courts allowing the award counter:

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[26] See particularly *Bush* v. *Lucas*, 462 U.S. 367 (1983), where the Court declined to supplement the statutory backpay remedy even though that meant that an employee would receive no damages for emotional distress when his First Amendment rights were infringed (*id.* at 372 n.9). See also, *e.g.*, *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988)(declining to allow additional damages remedy against officials who wrongfully terminate Social Security benefits); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (declining to supplement Clayton Act's treble-damage remedy with right to contribution); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981)(declining to supplement Title VII backpay remedy with right to contribution); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981)(federal common law on interstate water pollution supplanted by intervening enactment of Federal Water Pollution Control Act Amendments of 1972); *United States* v. *Gilman*, 347 U.S. 507 (1954)(declining to allow the Government to recover indemnity against an employee whose negligence had made it liable under the Federal Tort Claims Act); *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947)(declining to allow the Government to bring a claim in tort to recover its costs of caring for an injured soldier).

(1) that the loss is real, however intangible it may be, and (2) that problems of measurement should not justify denying all relief." 436 U.S. at 623 (citation omitted).[27]

Here, as in *Higginbotham*, this Court should take DOHSA as its "primary guide." The balance struck by Congress in DOHSA, the Jones Act, and the FELA is neither outmoded nor overtaken by a consistent body of state law or foreign law, as the Zicherman *amici* suggest.[28] With respect to state law, the various legislatures have arrived at a variety of answers for determining when, and under what conditions, relatives may obtain damages for loss of their decedent's society. Some states have reached the same conclusion as Congress and limited relief to pecuniary

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[27] In addition, the Court in *Higginbotham* quite properly questioned the plausibility of the loss-of-society award contemplated by *Gaudet*. *Gaudet* opined: "Loss of society must not be confused with mental anguish or grief, which is not compensable under the maritime wrongful-death remedy. The former entails the loss of positive benefits, while the latter represents an emotional response to the wrongful death." 414 U.S. at 585-86 n.17. Shortly after *Gaudet*, a leading text questioned this distinction. G. Gilmore & C. Black, Law of Admiralty 372 (2d ed. 1975)(describing footnote 17 in *Gaudet* as possibly "the least convincing footnote . . . in the history of our jurisprudence."). And, in *Higginbotham*, the Court, citing Gilmore & Black, stated that the "award contemplated by *Gaudet* is especially difficult to compute, for the jury must calculate the value of the lost love and affection without awarding damages for the survivors' grief and mental anguish, even though that grief is probably the most tangible expression of the survivors' emotional loss." 436 U.S. at 623 n.17. See also 2 D. Dobbs, Law of Remedies § 8.3(5), at 441-42 (2d ed. 1993)("Perhaps some jurors consciously endeavor to distinguish lost love from mental distress but it is difficult to believe that they are successful in doing so.").

[28] Lock. Pl. Br. 10-12, 16-20; Dooley Br. 20.

damages.[29] Some states limit awards of loss-of-society damages to specified relatives, excluding siblings.[30] Other states limit a parent's loss-of-society damages for the death of a child to the period of the child's minority.[31] Some

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[29] See *Gonzalez* v. *New York City Housing Authority*, 572 N.E.2d 598, 600-01 (N.Y. 1991)(loss of society damages not available for wrongful death cases); *Still by Erlandson* v. *Baptist Hosp., Inc.*, 755 S.W.2d 807, 813 (Tenn. Ct. App. 1988)(wrongful death statute "does not provide for recovery for grief or loss of consortium by the decedent's children" (citations omitted)); *Joy* v. *Bell Helicopter Textron, Inc.*, 999 F.2d 549, 565-66 (D.C. Cir. 1993) (District of Columbia does not award loss of society damages for wrongful death); compare *Green* v. *Bittner*, 424 A.2d 210, 215-16 (N.J. 1980)(limiting damages for loss of deceased child's companionship to pecuniary value of comparable services by caregiver).

[30] See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 12-612(A), 12-613 (1994) (limited to surviving spouse, children, and parents); N.D. Cent. Code § 32-21-03 (1993) (limited to surviving spouse, children, or parents); Okla. Stat. tit. 12, §§ 1053(B), 1055 (1995) (same); Or. Rev. Stat. § 30.020(2)(d) (1994) (limited to surviving spouse, children, or parents or stepchildren or stepparents); Tex. Civ. Prac. & Rem. Code Ann. § 71.004(a) (West 1995) (limited to surviving spouse, children, or parents).

[31] See, *e.g.*, Ind. Code Ann. § 34-1-1-8(a), (e) (Burns 1994) (loss of companionship may be awarded parents of child who was unmarried, without dependents, and under 20 years of age (or under 23 years of age, if enrolled in school)); *Counts* v. *Hospitality Employees, Inc.*, 518 N.W.2d 358, 361 (Iowa 1994) (loss of society may be awarded to parents of child under 18 years of age); Ky. Rev. Stat. Ann. § 411.135 (Michie 1994) (parents may recover for loss of society for deceased child's minority); Okla. Stat. tit. 12, § 1055 (1995) (parents may recover damages for loss of companionship of unmarried and unemancipated minor child); Vt. Stat. Ann. tit. 14, § 1492(b) (1994) (pecuniary injuries for death of minor child include loss of child's companionship); Wash. Rev. Code Ann. § 4.24.010 (Michie 1994) (parents of deceased minor child or of an adult child on whom parents were dependent may recover damages for loss of the child's love and comanionship).

impose caps on awards of such damages.[32] Finally, some states generally allow relatives to recover such damages without an explicit statutory limit on recovery.[33]

Similarly, other nations that are signatories to the Warsaw Convention have not reached a consensus as to whether loss-of-society damages should be awarded in death actions. As plaintiffs point out, some civil-law countries allow non-pecuniary damages such as *dommage moral* in death actions; but others, such as Germany,[34] do not allow non-pecuniary damages in death actions.[35] Under English

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[32] See Colo. Rev. Stat. § 13-21-203 (1994) (cap of $250,000); Kan. Stat. Ann. § 60-1903 (1994) (cap of $100,000); Me. Rev. Stat. Ann. tit. 18-A, § 2-804(B) (West 1994) (cap of $75,000); Wash. Rev. Code Ann. § 4.56.250 (Michie 1994) (cap of "an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages"); Wis. Stat. § 895.04(4) (1994) (cap of $150,000). Compare N.H. Rev. Stat. Ann. § 556:13 (1994) (cap of $50,000 unless decedent is survived by a dependent relative).

[33] See, *e.g.*, Ill. Rev. Stat. ch. 740, ¶ 180/2 (1995); Mich. Stat. Ann. § 27A.2922(3), (6) (1995); Miss. Code Ann. § 11-7-13 (1993); Nev. Rev. Stat. Ann. § 41.085(1) - (4) (Michie 1993); Ohio Rev. Code Ann. § 2125.02(A), (B) (Anderson 1994); W.Va. Code § 55-7-6(b), (c) (1994).

[34] H. McGregor, *Personal Injury and Death*, in 11 International Encyclopedia of Comparative Law, ch. 9, § 41, at 17 (A. Tunc. ed.) ("H. McGregor")("[T]he GERMAN Civil Code starts . . . with the general rule that compensation is to be given only for material losses except where specific contrary provision is made (CC § 253) and then proceeds to make such specific contrary provision for personal injury but not for wrongful death . . . ."); C. Hodges, Product Liability: European Laws and Practice 370 (1993); 1 E. Cohn & W. Zdzieblo, Manual of German Law ¶ 323, at 161-62 (2d ed. 1968).

[35] See generally H. McGregor at 17: ("[A] middle solution allowing *dommage moral* for personal injury but disallowing it for wrongful death is favoured by a variety of legal systems, ranging from the SCANDINAVIAN to the ROMAN-DUTCH . . ." (citations omitted).

law, loss-of-society damages (called "bereavement") are the only non-economic damages that are allowed; and those damages are capped at £7,500 and restricted to a surviving spouse or to a surviving parent of an unmarried minor child.[36]

In short, contrary to the Lockerbie Plaintiffs' Committee (Lock. Pl. Br. at 10-12), there is no agreement either within or without the United States on when and under what conditions a claimant should recover damages for the loss of the decedent's society; and there certainly is no consensus as to whether the sister and mother of the decedent may recover loss-of-society damages when, as here, the decedent was a married adult.[37] Thus, as *Higginbotham* commends, the Court should adhere to the balance that Congress struck in the Death on the High Seas Act rather than reweigh the factors and come to its own, different resolution.

2. The Court Has Limited *Gaudet* to Its Facts and That Decision Should Not Be Extended to Cover Cases Arising Under the Warsaw Convention.

In holding that loss-of-society damages are available in Warsaw Convention cases, the Court of Appeals relied principally on *Sea-Land Services* v. *Gaudet*. In that case, the

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[36] Fatal Accidents Act, 1976, ch. 30, § 1A, *as amended by* Damages for Bereavement Order 1990, S.I. 1990 No. 2575 (applicable in England and Wales). In Scotland, only a spouse, parent, child, or foster child of a decedent may recover loss of society damages. Damages (Scotland) Act 1976, ch. 18, §§ 1(4), 10(2).

[37] The decedent's husband has prosecuted his own action in California, *Kole* v. *Korean Air Lines*, No. C-83-4038 (N.D. Cal.).

Court, by a 5-4 margin, ruled that the family of a longshoreman injured in the territorial waters could recover loss-of-society damages for his resulting death. 414 U.S. at 585-90.

The federal common law applicable to the Warsaw Convention should not be derived from *Gaudet*. Even though *Gaudet* was rendered in admiralty, "where the federal judiciary's lawmaking power may well be at its strongest . . . ," *Northwest Airlines* v. *Transport Workers*, 451 U.S. at 96, *Gaudet* has been cut back materially because, even in admiralty, the Court has a "duty to respect the will of Congress." 451 U.S. at 96 (citations omitted). Thus, this Court has in two later decisions limited *Gaudet* to its facts and restored DOHSA as the basic federal law governing wrongful death.

Mobil Oil v. *Higginbotham* ruled that *Gaudet*'s "holding . . . applie[d] only to coastal waters," and that, consistent with DOHSA, loss-of-society damages could not be awarded in accidents occurring on the high seas. The Court reasoned that "[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." 436 U.S. at 623, 625.

Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990), placed further limits on *Gaudet*. There a Jones Act seaman had been stabbed to death while his ship was in port. Even though the assault had occurred in the territorial waters, the Court held that the decedent's family could not recover damages for loss of society because those damages were not available under the Jones Act: "The logic of *Higginbotham* controls our decision here. *The holding of Gaudet applies only in territorial waters, and it applies only to longshoremen.* . . . We must conclude that there is no recovery for loss of

society in a general maritime action for the wrongful death of a Jones Act seaman." 498 U.S. at 31, 33 (emphasis added).

Gaudet is out of step with DOHSA, the Jones Act, *Higginbotham*, and *Miles*. Under DOHSA, the family of a passenger killed while aboard a vessel on the high seas may not recover loss-of-society damages. Similarly, the family of either a Jones Act seaman or a longshoreman killed on the high seas may not recover for loss of society. Finally, the family of a Jones Act seaman killed in the territorial waters may not recover damages for loss of society. Selecting *Gaudet* as the source of the federal common law of damages simply breeds additional discontinuities in the law.[38]

It makes little sense to reject DOHSA as the source of federal common law for death actions, in favor of a judicial decision that has been subsequently minimalized in deference to DOHSA. Moreover, when there is at hand a federal statute that governs deaths on two-thirds of the earth's surface -- namely, the high seas -- it is passing strange to say that air disasters, which may occur anywhere in the world, should be governed not by DOHSA, but by a judicial decision that applies only when a longshoreman is killed within three nautical miles of the U.S. coastline.

In short, DOHSA should serve as the source of the federal common law of damages for wrongful death actions under the Warsaw Convention.

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[38] Four members of the Court in *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274 (1980), argued that DOHSA and the Jones Act should not be accorded "overwhelming analogical weight" because the statutes are "hopelessly inconsistent with each other." *Id.* at 283 (citation omitted). On the issue of damages, however, DOHSA, the Jones Act, and the FELA are entirely consistent.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit in this matter should be vacated and the case remanded with instructions to take the Death on the High Seas Act as the source for determining proper beneficiaries and available damages in a wrongful death action under the Warsaw Convention.

Respectfully submitted,

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